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ABBREVIATIONS.

DXT.....Defendants' Trial Exhibits
Tr.....Transcript of Trial Testimony
Dep.....Depositions
App.....Appendix

IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1954.

No. .....

R. W. FORD, D. B. COLE, and B. F. CONAGHAN,
Petitioners,

vs.

HUGHES TOOL COMPANY, *Respondent.*

PETITION *for* WRIT *of* CERTIORARI.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on September 15, 1954, in the cases of *Cole* v. *Hughes Tool Company, Conaghan* v. *Hughes Tool Company,* and *Hughes Tool Company* v. *Ford.*

Citations of Opinions Below.

The District Court opinions are reported at 113 F. Supp. 519; 113 F. Supp. 527, and 114 F. Supp. 525, and reproduced in Appendix B hereto. The opinion of the Court of Appeals is reported at 215 F. 2d 924 (advance sheets of November 22, 1954) and reproduced in Appendix B.

Jurisdiction.

The judgment of the Court of Appeals was entered September 15, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented.

1. Are antitrust cases to be decided on the fundamental principles announced in such cases as the *Aluminum Co.* case, *American Tobacco* case,[1] and the recent *Shoe Machinery* case,[2] or are these cases authority only if the case at bar corresponds in every detail?

2. Did the Court of Appeals err in holding that it is a defense to a charge of antitrust law violation for accused to show that it makes a better product and that its restraint of the market is useful to its research?

3. May a Court of Appeals consider the "relevant field of commerce" in an antitrust case sufficiently broad to include substitute mechanisms fundamentally different from each other merely because they produce a result that has some general similarity?

4. Did the Court of Appeals err in summarily rejecting all of the testimony, accepted by two District Courts, of a witness hired by the objecting party to observe and report upon field operations to its sales department and testifying as to his observations, because the witness happens to be a lawyer?

5. May a Court of Appeals arbitrarily reverse carefully documented findings of a District Court without pointing to anything definitely indicative of error therein?

Statutes Involved.

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. 1, 2, and Sections 3 and

1. 148 F. 2d 416. Sitting as a Court of last resort. The Aluminum case was fully endorsed by the U. S. Supreme Court in the American Tobacco case, 328 U. S. 781, 812, 813; 66 S. Ct. 1125, 1140.

2. 110 F. Supp. 295, affirmed by the Supreme Court, 347 U. S. 521, 74 S. Ct. 699, 98 L. ed. 606.

4 of the Clayton Act, 15 U. S. C. 14, 15. They are reproduced in Appendix A.

Statement.

Three actions of identical nature were commenced by the Hughes Tool company.[3] One case, brought against Ford, was commenced in the United States District Court for the Eastern District of Oklahoma. The other two cases, brought against Cole and Conaghan, respectively, were commenced in the Western District of Oklahoma. Each defendant was engaged in retipping the teeth of rotary drilling bits used for drilling oil and gas wells, many of which were manufactured by Hughes and leased by it to drillers.

Each complaint contained three counts: (*1*) for patent infringement; (*2*) for conversion of Hughes' bits; and (*3*) for interference with Hughes' property and contract rights.[4] The defendant in each case filed a counterclaim charging violations of Sections 1 and 2 of the Sherman Act[5] and sought damages under Section 4 of the Clayton Act.[6] For convenience, the three cases were consolidated for trial, but not for decision. Thus we have two District Court decisions, one by District Judge VAUGHT and one by District Judge WALLACE. The cases were appealed to the United States Court of Appeals for the Tenth Circuit, and a decision on the combined cases was rendered by that court on September 15, 1954.

Two of the patents in suit expired prior to the trial, and the third patent has been adjudicated invalid by the Court of Appeals. No patent questions are presented here.

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3. Hereinafter called Hughes.

4. Jurisdiction was based on the fact that infringement of patents was charged and diversity of citizenship existed.

5. 15 U.S.C.A., Sections 1 and 2; Appendix A, pp. 1, 2.

6. 15 U.S.C.A., Section 15; Appendix A, p. 2.

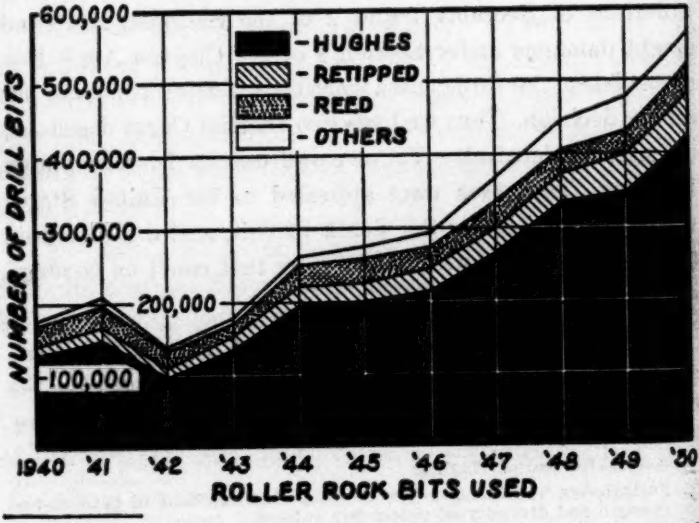
District Judge WALLACE, in the *Ford* case, held the Hughes Tool Company guilty of violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, and enjoined further violations of such acts by Hughes and ordered an accounting.

District Judge VAUGHT, in the *Cole* and *Conaghan* cases, held that Hughes had not violated either the Sherman Act or the Clayton Act.

Chief Judge PHILLIPS, speaking for the Court of Appeals for the Tenth Circuit, absolved Hughes of the charge of antitrust law violation. Circuit Judge MURRAH dissented, agreeing unequivocally with District Judge WALLACE.

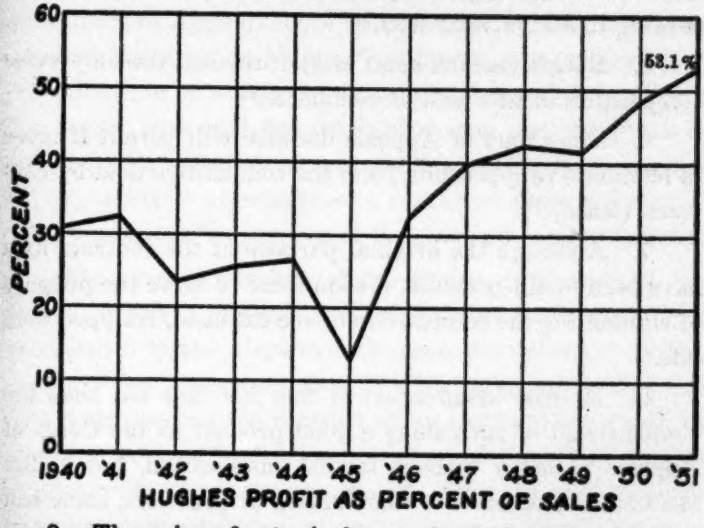
A Few Salient Facts.

1. Hughes' own determination of its competitive position (graphically illustrated from undisputed evidence):[7]

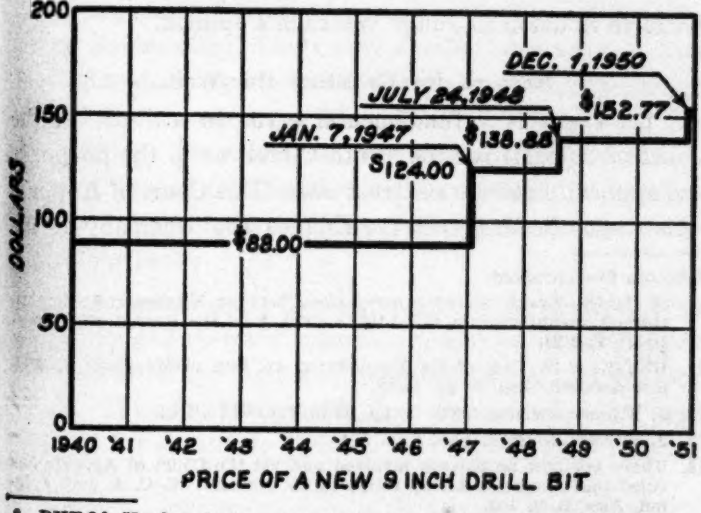


7. DXT-28a-m, Hughes Tool Company Competitive Activity Reports of Bit Usage, 1940-1950; DXT-29, Graph Charts of same (Vol. 3 of the Record Exhibits—Index Tabs 7 and 8); J. Wallace opinion, App. B, p. 32, fns. 72, 73.

2. Hughes' own determination of its profits to sales ratio (before taxes) (graphically illustrated):[8]



3. The price of a typical new nine-inch roller drill bit (graphically illustrated):[9]



8. DXT-2d, Hughes Answer to Interrogatories (Vol. 3 of the Record Exhibits—Index Tab 2); J. Wallace opinion, App. B, p. 30, fn. 69.

9. DXT-30a-c, published price list changes from the Composite Catalog

4. Hughes establishes the prices for all new roller drill bits[10] (in conspiracy with the Reed Roller Bit Company, according to Judge WALLACE).[11]

5. Retips (second-hand bits) furnished the only price competition in this field of commerce.[12]

6. The Court of Appeals decision will permit Hughes to eliminate retipped bits from the competitive field by contract (lease).[13]

7. Although the original purpose of the contract may have been to aid research, it soon came to serve the purpose of eliminating the competition of second-hand, retipped drill bits.[14]

8. Hughes' domination of this field has not been the simple result of furnishing a good product as the Court of Appeals assumes without factual justification, but rather has been the result of a combination of practices, some bad *per se* and some not, but all operating together to secure and hold control of this industry against all competitors as set forth in detail in Judge WALLACE's opinion.

Reasons for Granting the Writ.

1. There is a fundamental error in attitude in the Court of Appeals for the Tenth Circuit as to the purposes and application of the antitrust laws. This Court of Appeals insists upon looking upon the Hughes Tool Company as the

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Footnote 9—*Continued*:

of the Oil Weekly showing comparison between Hughes and competitive bit manufacturers (1936-1951) (Vol. 3 of the Record Exhibits—Index Tab 9).

10. DXT-27, p. 24, Dep. of Mr. Kennedy; p. 49, Dep. of Mr. Best; J. Wallace decision, App. B, pp. 26-29.

11. J. Wallace decision, App. B, pp. 26-29, fns. 58-70, incl.

12. J. Wallace decision, App. B, p. 31.

13. There are now no patents involved and yet the Court of Appeals has ruled that Hughes can stop retipping by contract. C. C. A. 10th opinion, App. B, p. 106.

14. J. Wallace opinion, App. B, pp. 34-48, fns. 100-118.

fountainhead of all good in the drill bit industry, and therefore as something to be protected at all costs. Consequently, this Court of Appeals looks upon Ford, Cole and Conaghan as mere poachers on Hughes' preserves, and worthy of no consideration or protection under any statute. This attitude can easily lead, and has led in this case, to a situation in which the Courts condone monopoly, restraint of trade, price fixing, exclusion of competitors, and all of those other practices which it is the purpose of the antitrust laws to prevent.

The present decision of the Court of Appeals of the Tenth Circuit is in direct conflict with the fundamental law established by the *Aluminum Co.* case, the *American Tobacco* case[15] and the recent *Shoe Machinery* case[16] in that this Court approached the decision of the monopoly or restraint question in a completely wrong way and therefore reached a completely erroneous conclusion. This Court of Appeals has obviously attempted to decide whether or not Hughes' monopoly and restraint will expedite the improvement of drill bits, reached the conclusion that it will, and therefore given its blessing. The Court should have applied itself instead to deciding whether or not the industry is being prevented from progressing through at least reasonably free competition. The Court has thus substituted its own judgment of what is good for the industry, for the statutory law and the interpretations of that law found in the above cited and other cases.

Furthermore, the Court of Appeals has considered the monopoly and restraint questions piecemeal instead of considering all of the facts and circumstances as an integrated whole. Thus the Court holds that various individual practices do not constitute a violation of the antitrust laws and

15. Fn. 1.
16. Fn. 2.

fails to consider the situation in its entirety. Properly considered it is at once apparent that Hughes is restraining trade and monopolizing the roller rock bit industry as Judge WALLACE found and capably explained.

Concerning the fact of monopoly, the Court of Appeals clearly is in conflict with the basic law set forth in the *Aluminum* case in holding that Hughes has not been guilty of unlawful competitive practices. Judge HAND in the *Aluminum* case pointed out that Alcoa's monopoly position had been achieved purposely and that Alcoa had in fact excluded competitors by progressively embracing each opportunity to fortify its dominant position, and by the great advantage it had over any newcomer to the business.[17] The Court concluded that Alcoa's monopoly had not been thrust upon it, and this holding was made regardless of consideration of Alcoa's unlawful practices (page 432). The market dominance of Hughes in the middle 30's was purposely achieved and began by early threats to prosecute all infringers,[18] restraint of trade contracts eliminating would be competitors,[19] purchasing the licensor company owning patents under which Hughes' major competitor (Reed Roller Bit Company) was an exclusive licensee and using the royalty reports from Reed to gain a competitive sales advantage,[20] threatening letters to Mr. Schwab of Bethlehem Steel respecting Chicago Pneumatic Tool Company's entry into this field of commerce,[21] and never licensing under its rock bit patents.[22]

17. Fn. 1, p. 431.
18. DXT-71, p. 232, Hughes advertisements (Vol. 3 of the Record Exhibits, Index Tab 50); J. Wallace opinion, App. B, p. 52.
19. DXT-7, pp. 22-27, Chicago Pneumatic v. Hughes printed record, DXT-52, contract with Williams Iron Works; DXT-61 (Vol. 3 of the Record Exhibits, Index Tab 31); J. Wallace opinion, App. B, 53, fn. 123.
20. DXT-43, license agreement; DXT-44a-g; DXT-45 (Vol. 3, of Record Exhibits, Index Tabs 22, 23, 24); J. Wallace opinion, App. B, p. 55, fn. 129.
21. DXT-49b (Vol. 3 of Record Exhibits, Index Tab 28); J. Wallace opinion, App. B, p. 56, fn. 131.
22. DXT-9, p. 43, Kuldell dep.

The evidence is undisputed that Hughes obtained monopoly power by 1936[23] and has meant to keep, and has kept, a complete and exclusive hold on the roller rock bit market until the present date. Judge HAND in the *Aluminum* case in brushing aside any innocent beginning of monopoly observed that the continuance and retention of Alcoa's preferred position was in a violation and implied the necessary general intent (page 432).

The *American Tobacco* case was a complete endorsement of the *Aluminum* case and Justice BURTON speaking for the Court said the primary consideration in determining whether there is illegal monopolization is whether "power exists to raise prices or to exclude competition when it is desired to do so."[24] It was further stated that it was not of "importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful * * *" if the "sum of the acts" result in the power and intent to control an industry which the statute forbids (page 809). That Hughes had the power to raise prices through effective control of the market in this field of commerce is clearly shown by the published catalog pages for the Oil Weekly for the years 1936, 1948, 1950, 1951, showing a substantial correspondence of price changes in bits of every size by Reed and other competitors[25] almost simultaneous with Hughes, although employees of both Hughes and Reed testified as to the great amount of time and effort put forth respecting a price change, and that such changes were kept secret.[26] The Court of Appeals clearly ignored the basic law

23. DXT-28a-m; DXT-29, DXT-32a, 34b, 35, 38, 62 (Vol. 3, of the Record Exhibits, Index Tabs 7, 8, 11, 13, 14, 17, 41); J. Wallace opinion, App. B, p. 26, fn. 57.

24. Fn. 1, p. 811.

25. DXT-30a-o (Vol. 3 of the Record Exhibits).

26. DXT-23, pp. 33-37, Ayres dep.; DXT-24, p. 33, Montrose dep.; DXT-10, pp. 13-15, Davis dep.; DXT-18, pp. 14, 23, 24, Clarke dep.; DXT-25, pp. 9, 10, 19, Hamaker dep.

respecting the illegal monopoly set forth in the *Aluminum* case (page 427) and in the *American Tobacco* case (pages 811, 814) by assuming that there had to be a definite understanding or arrangement between Hughes and other manufacturers for raising prices to violate Section 2 of the Sherman Act. Hughes' prices have always increased since 1940, but the Court of Appeals disregarded the undisputed testimony of employees and executives regarding the aspects of effort and secrecy, stating that such procedure would only be necessary in a price decrease, and not in a price increase.

Although the Court of Appeals noted that Reed's competitive production increased[27] from about 27,000 bits in 1940 to about 40,000 in 1950, it failed to note that this represented 14.1% of the *total* market in 1940, and *only* 7.1% in 1950.[28] The Court of Appeals apparently gave no consideration to the rule of monopoly as set forth in the *Aluminum* and *American Tobacco* cases.[28a]

A noteworthy example of the exercise of Hughes' dominant power to exclude competition is the incident of the Williams Iron Works in 1937. Although in litigation with Williams, Hughes upon finding that the Williams Company was working on a thin financial margin in the sale of competitive drill bits induced the First National Bank of Tulsa not to extend Williams credit on the strength of orders from major drilling contractors.[29] In like manner, Hughes

27. C. C. A. 10th opinion, App. B, p. 108.

28. Fn. 7, 23; DXT-28a-m, DXT-29.

28a. In United States v. Griffith, 334 U. S. 100, Justice Douglas, speaking for this Court, stated that "it is sufficient that a restraint of trade or monopoly results as a consequence of defendant's conduct or business arrangements" (page 105); and at page 107 that Section 2 of the Sherman Act "is aimed, *inter alia*, at acquisition or retention of effective market control."

29. DXT-47, Hughes Competitive Sales Report of Aug. 6, 1937 (Vol. 3 of the Record Exhibits, Index Tab 26).

induced the Oil Well Supply Company not to accept charges for Williams competitive bits, thereby causing loss of a major oil company account for Williams.[30]

The Court of Appeals apparently does not consider second-hand retipped bits of any importance,[31] even in the face of Hughes' own competitive activity reports[32] which kept weekly surveillance on both new and retipped roller rock bits from 1940 to 1950 and before that, by weekly field letters,[33] plus the testimony of two Hughes vice presidents and several large drilling contractors that retipped bits were quite competitive.[34] Retipping of used bits began about 1937 and Hughes immediately took steps to restrain this lower price competition, mainly through the lease agreement[35] which had been started a few years previous. Small welding shops, large drilling contractors, and major oil company operators all retipped bits, but Hughes, to maintain and further its monopoly, utilized its field salesmen as a private "police force" (as so designated by Hughes' vice president Mr. Ayers)[36] in order to apply restraint efforts against the small welding operators only by numerous predatory tactics.

The Court of Appeals in an attempt to circumvent the decree of this Court in the *United Shoe Machinery* case

30. DXT-48, Hughes Competitive Sales Report of May 4, 1938 (Vol. 3 of the Record Exhibits, Index Tab 27).

31. C. C. A. 10 opinion, App. B, p. 109.

32. DXT-28a-m (Vol. 3 of Record Exhibits, Index Tab 7); J. Wallace opinion, App. B, pp. 32, 33, fns. 74, 75).

33. DXT-32a, b, 34d, 38 (Vol. 3 of Record Exhibits, Index Tabs 11, 13, 17); J. Wallace opinion, App. B, p. 32, fn. 72).

34. DXT-22, p. 23, Dietrich dep., Hughes executive vice-president; DXT-24, p. 9, Montrose dep., Hughes vice-president in charge of sales; DXT-33a-b, 62 (Vol. 3 of Record Exhibits); Tr. 347, Mobley; Tr. 479-483, Garr; Tr. 450, 454, Stephens; Tr. 671, 677, Morgan; J. Wallace opinion, App. B, pp. 43, 44, fns. 100-108.

35. J. Wallace opinion, App. B, pp. 25, 26; C. C. A. 10 opinion, App. B, p. 89.

36. DXT-6, p. 131 (William v. Hughes printed record).

stated that the conditions were different here, and that Hughes' lease had not prevented competition. In so holding the Court is in conflict with this Court's affirmance of Judge WYZANSKI's holding in the *United Shoe* case that "United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines"—and where the lease contracts "instead of encouraging competition based on pure merit, further the dominance of a particular firm," they were "unnatural barriers" and "restrict a free market." The *United* case held that the lease system made impossible a second-hand market in United's own machines and precluded United from suffering the kind of competition that a second-hand line offers. In analyzing the dominant position of the United Shoe Co., it was pointed out that market weakness was the result of "no substantial substitute competition from a vigorous second-hand market in shoe machinery."[37] The Court of Appeals apparently did not consider the abundance of evidence respecting Hughes' practices surrounding the lease agreement as "unnatural barriers" to restrict a free market in roller rock bits. The purpose of the lease agreement was to exclude retipping competition through control of the bits in the field and had to do all with sales competition.[38] In order to maintain and keep its monopolistic position Hughes used the lease contract in numerous replevin actions to drive the small retippers "to the bushes and take their business off the front street to the back street."[39] The private "police force" was used to build up a tradition to the oil drilling trade that the small retippers were irresponsible people and induced dishonesty, using tactics of slander and

37. 115 F. Supp. 295, 344.

38. Mobley, Tr. 294, 323.

39. Mobley, Tr. 345, DXT-34d (Fn.) 34a and c (Vol. 3, Record Exhibits, Index Tab 13).

libel in an attempt to brand all retippers as thieves.[40] They have even inferred such slander before the courts against these retipper defendants without one iota of proof. Hughes "police force" got the idea across to the trade associating stolen bits and retippers as one and the same.[41] Hughes salesmen laid traps for alleged violation of the Hughes lease by picking up dull bits and selling them to the trade in order to intimidate the small retipping operators.[42] The Court of Appeals ignored Hughes' use of its dominant power combined with the lease contract as evidence of intent to restrain and completely exclude the second-hand bit market.

2. A careful analysis of the decision of the Court of Appeals indicates that it is the opinion of that court that the technological leader in an industry may restrain the market in that industry if it finds such restraint is useful to it in making further technological advances.[43] This the Court of Appeals holds to be true, even though the field of commerce is clearly dominated by the accused, the restraint is clearly important, and the accused sets the prices, makes very high profits, and adopts many definitely predatory practices. As Judge HAND pointed out in the *Aluminum* case[44] "that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad,' it forbade all." Similar excuses have been construed by this Court not to avoid the statute.[45]

If the antitrust cases decided or approved by this Court

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40. Mobley, Tr. 325, 361, 362.

41. Mobley, Tr. 362.

42. Ford, Tr. 206; Hunter, Tr. 644.

43. C. C. A. 10 opinion, App. B, pp. 90-96.

44. Fn. 1, p. 427.

45. Fashion Originators Guild v. U. S. Trade Commission, 312 U. S. 457, 467-468, 61 S. Ct. 73. Reasonable protection defense for the benefit of the industry; International Business Machine Corporation v. U. S., 298 U. S. 138, 139-140. Protection of good will as legal justification for illegal acts.

are not to stand as authority for anything more than the conclusion to be reached on the specific facts in those cases, there will be no end to the variety of decisions that will appear, and there can be no standard of justice in this field unless the Supreme Court reviews each antitrust case as it arises. The Supreme Court should make it clear that the fundamental law that is to be found in the cases decided or approved by this Court is to govern the decision of subsequent antitrust cases. No two antitrust cases can be expected to be the same in every detail.

3. One important point which is somewhat difficult to make because it involves facts almost as much as law is the matter of the scope and extent of the "relevant field of commerce" as found by the District Court and the Court of Appeals. Judge WALLACE found that the "relevant field of commerce" included roller rock bits of all types, but not drag bits, fish tail bits, diamond bits, and other bits that would drill a hole, but were physically quite unlike and distinctive from roller rock bits. Hughes kept competitive activity records on the basis of roller rock bit usage, and the testimony clearly indicates that there was not a free substitution of these other types of bits for roller rock bits. The record provides an abundance of testimony from well known drilling contractors respecting their unanimous preference for roller rock bits in oil well rotary drilling, as compared to substitute drag, fish tail or other bits, none of which has been used for many years in the rotary drilling industry. Judge WALLACE in his opinion meticulously set forth this competent evidence in following this Court's well settled principles that Section 2 of the Sherman Act prohibits monopolization of "any part" of trade or commerce.[46]

46. J. Wallace opinion, App. B, pp. 15-23, fn. 22-43.

The Court of Appeals ignored this evidence and included these substitute bits in order to expand the "relevant field of commerce." Such action is clearly in conflict to the holding of this Honorable Court in many previous cases, among them the *Gypsum Co.* case,[47] the *American Tobacco* case[48] and the *Times-Picayune* case.[49] This Court in the above cases has clearly established the principle that although there are substitutes for every commodity, the relevant market could not include such an indefinite range.[50] As this Court stated in the *Yellow Cab* case, the Act was "designed to sweep away all appreciable obstruction so that the statutory policy of free trade might be effectively achieved."[51]

4. The Court of Appeals for the Tenth Circuit has completely misapprehended the law of privilege as announced by this Court in *Hickman* v. *Taylor,* 329 U. S. 495, 506, 507, 511, 67 S. Ct. 385, 91 L. ed. 451. It has summarily rejected all of the testimony of Mr. Mobley, a lawyer, primarily upon the ground that he is a lawyer, even though he was hired to do things other than practice law, and testified to facts observed by him for the Hughes sales department, as distinguished from confidential communications from a client. The Court of Appeals described this testimony as "hearsay" as an additional ground for summarily rejecting it, but such a designation of the testimony is so clearly wrong and appears to be wrong so clearly from reading the testimony that it is apparent that the Court really was rejecting the testimony as privileged. It is particularly worthy of note that this testimony was received and used

47. 333 U. S. 364, 68 S. Ct. 525, 92 L. ed. 746.
48. 328 U. S. 781, 66 S. Ct. 1125, 90 L. ed. 1575.
49. 345 U. S. 594.
50. 345 U. S. 594, 612.
51. 332 U. S. 218, 226; 67 S. Ct. 1560, 1564.

by both District Courts.[52] The record is clear that Mr. Mobley was working with Hughes' sales manager, Mr. Brown, respecting competitive rebuilding or retipping activities.[53] He later became assistant general manager of Hughes.[54]

5. Still further, the Court of Appeals for the Tenth Circuit treated the very carefully considered and documented decision of District Judge WALLACE in a most cavalier fashion. It overruled and changed his most important findings[55] without giving any plausible reason why it believed there to be error in these findings, and in a way definitely contrary to the evidence. The findings of the District Court, particularly when they are well documented, are entitled to more consideration, and it is highly important if we are to maintain a conscientious corps of District Judges that a very carefully prepared decision such as the one produced by Judge WALLACE be at least carefully considered and not merely brushed aside.

Judge WALLACE, for example, found that the Hughes "lease" had for its object the exclusion from the market of repaired, or retipped, or second-hand drill bits. This he determined as a result of testimony of not one but several of Hughes' own executives[56] as to the actual effect of the "lease" in practice. The Court of Appeals ignored this well documented finding and instead determined that the "lease" was originated to aid in research and simply assumed, contrary to definite proof, that it was never used for anything else. Even if it was originally conceived to aid in research,

52. J. Wallace opinion, App. B, pp. 39-43, fns. 84-97; J. Vaught opinion, App. B, p. 77.

53. DXT-9, p. 30, Kuldell dep.

54. Mobley, Tr. p. 280.

55. J. Wallace opinion, App. B, pp. 61-68.

56. J. Wallace opinion, App. B, pp. 40-43, fns. 86-95.

that does not even indicate that it was not subsequently used to restrain trade.

We cannot possibly, within the confines of this petition, enter into a detailed argument or discussion of the facts of this complex litigation, but a comparison of the District Court decision of Judge WALLACE with the Court of Appeals decision will show plainly that Judge WALLACE has exhibited a firm and thorough grip on the fundamentals of the antitrust laws and the laws of evidence, and the Court of Appeals has gone so far astray on both of these subjects that it is imperative that this Honorable Court exercise its supervisory authority.

It is also worthy of note that the practical situation here involved relates to the drill bits that are used to drill the oil and gas wells that supply a major part of our country's power. Any monopolization of the drill bit business affects the cost of drilling oil and gas wells and possibly even the ability of the country to drill the wells that may be needed in case of a national emergency. In other words, a monopoly in the drill bit field seriously affects the whole oil and gas inpustry. The nine-inch bit size provides the great bulk of bit sales and by reference to the competitive sales charts (App. B, page 32) simple mathematics discloses that Hughes' gross business for 1950 approximated $66,000,000.00 with a profit of 48.4%, providing a net earning of approximately $32,000,000.00. Hughes, from its monopoly, in 1951 took a profit of 53.1% of its total sales. It set the prices and set the policies in this industry, and it will continue to do so to an even greater extent than before, if the Supreme Court does not consider and correct the decision of the Court of Appeals in this case.

Hughes now has approximately seventy-five per cent

of the total drill bit market. If retipping is eliminated, as it will be under the decision of the Court of Appeals, Hughes' percentage of the drill bit business will automatically increase to nearly eighty-five per cent of the total market, for retipped bits now occupy almost ten per cent of the field.

At the present time, all companies manufacturing new bits sell their new bits for the same prices that Hughes sells its new bits. Therefore, the only price competition in this industry arises from the fact that second-hand or retipped bits can be purchased at a much lower price. If Hughes is able to prevent the retipping of bits which it manufactures, the result will be to substantially destroy the market in second-hand or retipped bits, and thus the last vestige of price competition will be removed from this industry.

Hughes' patents have now expired, or been held invalid, but by its ruling, the Court of Appeals of the Tenth Circuit gives Hughes what amounts to a perpetual patent on retipping drill bits of its manufacture.

It is of utmost importance to the entire oil and gas industry, or any industry, that such a pattern for shackling free enterprise be repudiated.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. MCKNIGHT,
ROBERT F. DAVIS,
Counsel for Petitioners.

December 9, 1954.

APPENDIX A.

STATUTES INVOLVED.

SHERMAN ACT.

Title 15, U.S.C.A., Sec. 1: "Trusts, etc., Restraint of Trade Illegal—Exception of Resale Price Agreements—Penalty. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal: Provided, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 45, as amended and supplemented, of this title: Provided Further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor. * * *"

Title 15, U.S.C.A., Sec. 2: "Monopolizing Trade a Misdemeanor—Penalty. Every person who shall monopolize, or

attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

CLAYTON ACT.

Title 15, U.S.C.A., Sec. 14: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sales of goods, wares, merchandise, machinery, supplies or other commodities whether patented or unpatented, for use, consumption or resale within the United States, or any territory thereof, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors, of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Title 15, U.S.C.A., Sec. 15: "Suits by Persons Injured —Amount of Recovery. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. * * *"

APPENDIX B.

JUDGE WALLACE'S OPINION.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 2537-Civil.

HUGHES TOOL COMPANY, a corporation, *Plaintiff*,

v.

R. W. FORD, an individual, *Defendant*.

OPINION.

Filed June 2, 1953. John H. Pugh, Clerk U. S. District Court.

WALLACE, District Judge.

The plaintiff, Hughes Tool Company, a Delaware corporation, brings this action against the defendant, R. W. Ford, a resident of Ada, Oklahoma, to:

(1) Enjoin the defendant from future infringement and to recover damages for past infringement of plaintiff's Letters Patent No. 1,856,627, No. 1,983,316 and No. 2,333,746 relating to roller rock bits used in drilling for oil and gas.

(2) Enjoin the defendant from acts of trespass upon and conversion of and to recover damages for past trespasses and conversions of plaintiff's drill bits.

(3) Enjoin the defendant from further interference with and to recover damages for past interference with the plaintiff's lease agreements, whereby the plaintiff leases, rather than sells, the drill bits which it manufactures.

The defendant admits certain acts of welding on the worn cutter teeth of bits of various series of plaintiff's manufacturer but expressly denies that such acts constituted an infringement of lawfully issued patents.

The defendant counterclaims alleging in substance that

the plaintiff corporation has used its "lease" agreement as part of a plan to dominate and control the roller rock bit industry and charges that the plaintiff corporation is operating in violation of the antitrust statutes. Defendant in his counterclaim requests the Court to find the plaintiff to be in violation of the antitrust laws, to decree that the patents and the "lease" contract here involved to be unenforceable, to enjoin any future monopolistic practices by the plaintiff, and to decree an accounting for the purpose of determining the damage done to this defendant for the purpose of awarding relief in accordance with Section 4 of the Clayton Act.

The evidence introduced at the time of trial of these issues consisted of oral testimony, testimony given in discovery depositions, the records of testimony given in former cases introduced upon stipulation of counsel, and a large number of exhibits.

I.

The plaintiff is the owner of Fletcher Patent No. 1,856,627, Scott and Garfield Patent No. 1,983,316, and the Scott, Garfield and Cockrum Patent No. 2,333,746 and in this action sues for past infringement.

The validity of Patent No. 1,856,627 and Patent No. 1,983,316 was not attacked by the defendant.

The defendant admittedly retipped[1] partially worn down teeth of drill bits of plaintiff's manufacture made in accordance with Patent No. 1,856,627 and Patent No. 1,983,316. However, defendant argues that inasmuch as he merely retipped partially worn down teeth of drill bits made in accordance with Patent No. 1,856,627 and merely retipped partially worn down teeth, that were still interfitting, on drill bits made in accordance with Patent No.

1. Retipping is accomplished by placing the dull bit in a tub of cold water in such a position as to permit a few of the tooth stubs to be exposed; tungsten carbide is then welded thereon one at a time. The rest of the bit is submerged in the water to protect the temper thereof. Tungsten carbide is welded to a few of the teeth and then the cone is rotated to expose a few more teeth for retipping until all the teeth are retipped. This operation is to be distinguished from old machine rebuilding where there was a dissembling or reconstructing.

1,983,316, that such acts did not constitute an infringement of these two letters patent, but were only permissible repair.

Such a contention is foreclosed by the ruling in the first *Williams* case which involved retipping in regard to these same two patents. In his opinion Chief Judge PHILLIPS said:[2]

> "Williams, by his process of retipping, undertakes to restore the worn-out teeth as nearly as possible to their original form, size and position. He thus reconstructs and replaces that element of each patent wherein lies the novel features of the combination. We hold that so doing is not permissible repair, but reconstruction, constituting infringement. This conclusion finds support in *Hughes Tool Co.* v. *Owen*, 5 Cir., 123 F. 2d 950, in *Southwestern Tool Co.* v. *Hughes Tool Co.*, 10 Cir., 98 F. 2d 42, 45, *American Cotton Tie Co.* v. *Simmons*, 106 U. S. 89, 1 S. Ct. 52, 27 L. ed. 79, and *Hughes Tool Co.* v. *United Machine Company*, D. C. N. D. Tex., 35 F. Supp. 879."

Thus, any such acts of retipping by the defendant prior to the expiration dates of these patents constituted an infringement.[3]

The defendant vigorously contests the validity of "Patent No. 3" in suit, the Scott *et al.* Patent No. 2,333,746, referred to as the "interrupted heel tooth patent."[4]

The plaintiff alleges infringement of claims 1 and 4.[5]

Claim 1 provides:

> "In a well drill, a tapered cutter rotably mounted thereon, said cutter having a row of heel teeth circumferentially thereof to cut the outer portion of the well

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2. Williams v. Hughes Tool Co., (C. A. 10, 1950) 186 F. 2d 278, 284.

3. Since the filing of this lawsuit, both parents have expired. Patent No. 1,856,627 expired May 3, 1949, and Patent No. 1,983,316 expired December 4, 1951.

4. This patent was included in this lawsuit by an amendment to the complaint on July 25, 1952, just prior to trial.

5. (PX-4, p. 3.)

bottom, some of the teeth in said row having a portion projecting from the cutter surface a shorter height than the others, thus providing on said shorter teeth an open area normally out of contact with the well bottom so as to allow cleaning of the cutter by the flushing fluid, and a gage cutting surface on the outer ends of all said teeth to engage the wall of the well."

Claim 4 provides:

"In a well drill, an inwardly tapering cutter having a row of teeth circumferentially around the same, the outer ends of which are positioned to cut the side wall of the hole, there being crests on said teeth positioned to engage the bottom of the well, the crests on some of said teeth being comparatively short and extending from the inner ends of said teeth approximately one-half of the length of the tooth, there being formation receiving spaces at the outer ends of said short crested teeth some of said teeth being spaced more closely together in the row to throw the teeth out of step on bottom."

Counsel for plaintiff in making a preliminary statement regarding the object of this patent said:[6]

"Also Hughes Tool Company wanted to increase the speed in those formations [sticky formations], clean them better, and then they did what was really, well really it was a crazy sort of thing, having new teeth on the cutter, going to the trouble of making the invention, in order to accomplish it they then cut them off, or part of them. The witness can give more explanation of it, but in the heel row now, they take, in this illustration, its every alternative two and they cut away the outer end of that tooth crest. See, the way that's cut away as shown here on this bit, so they cut away alternative ends of the teeth in the heel row. The patent points out that there can be variations as how that is done.

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6. (R. 20.)

"Well now, what was the result? Certainly no one had ever thought of doing it before. Actually, just cutting away part of those two crests, they got a very material increase in speed in these formations, the drilling was faster. Another curious thing in instances, they would stay in the hole longer, actually have less teeth, they'd get more footage out of it, and while this is not as pronounced, perhaps, as the increase in speed in those formations, there was a very pronounced increase in speed."

An aim of the patented invention is to generally preserve the spacing of such rock teeth and the traction for the cutters which such teeth provide, and to improve the penetration and resulting drilling speed.

The advantage in reducing tooth contact is that with a given weight upon the bit the unit loading upon each tooth is thereby increased; and this results in a more effective fracture of the well bottom.

As stated in the patent application:[7]

"We also aim to provide greater amount of space on the cutter in which the material displaced by the cutter teeth may move and thus be better carried away by the flushing fluid and by so doing avoid clogging of the cutter by the information being drilled."

Although the plaintiff has submitted a considerable amount of evidence tending to prove the marked superiority of the bits employing the "interrupted heel teeth" the Court is of the opinion that this improvement does not rise to the dignity of invention. Unquestionably, this alteration in the structure of the "heel teeth" has resulted in a better drilling bit; however, every improvement upon a known process or invention does not necessarily smack of the genius of invention.

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7. (PX-2, p. 1.)

As said in *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*:[8]

> "The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. • • •"

This same principle was recognized and applied by Judge PICKETT in *Kobe, Inc.*, v. *Dempsey Pump Co.*, when he said:[9]

> "• • • The arrangement control valve in the piston assembly is new but we agree with the trial court that this is nothing more than the application of mechanical skill and is not invention. It required no greater skill or higher thought than that which would be expected of a mechanic trained and skilled in the art. The old and well known elements of the prior art perform the same mechanical function in these claims as they have been known to perform in the prior art and they produce the same result and cannot be considered an invention. The changes made in this device would readily occur to one skilled and acquainted with the already crowded art. • • •
>
> "The language used by this court in *Shaffer* v. *Armer*, 10 Cir., 184 F. 2d 303, 307, is particularly applicable where it was said: 'The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts.' *Atlantic Works* v. *Brady*, 107 U. S. 192, 200, 2 S. Ct. 225, 231,

8. (1950) 340 U. S. 147, 152, 153, 71 S. Ct. 127, 130. Cited in Kobe, Inc., v. Dempsey Pump Co., (C. A. 10, 1952) 198 F. 2d 416.

9. Ibid. at 430.

> * * * The device must not only be 'new and useful,' it must also amount to 'invention or discovery,' *Thompson* v. *Boisselier*, 114 U. S. 1, 11, 5 S. Ct. 1042, 1047 * * *; and '*perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable.*' *Reckendorfer* v. *Faber*, 92 U. S. 347, 356-357 * * *." (Emphasis supplied.)

L. L. Payne, assistant vice-president of engineering for plaintiff corporation, was the plaintiff's chief witness to support the validity of "Patent No. 3." He is a very intelligent and well qualified engineer who made a most capable witness. However, apart from the many technical niceties and scholarly scientific expressions it is apparent that the vital principle of this improvement is the spacing the heel teeth farther apart, to reduce the amount of "sticking up" in the softer drilling formations,[10] and a reducing in the size of the teeth at point of contact so as to obtain concentration of weight and pressure at the point where the tooth rests upon the bottom of the hole.

In "Patent No. 3," the plaintiff deletes the opposite end of each successive wide heel tooth to gain this effect; in substance this is the same as simply staggering two rows of narrow heel teeth, although structurally, doubtless, the deleting method enjoys some advantage.[11]

The fact that the teeth should in effect be "staggered" or irregularly arranged to avoid tracking in the rock teeth formation on the well bottom was recognized in "Patent No. 1" in suit. In sustaining the validity of that patent, in the first *Williams* case, *supra*, Chief Judge PHILLIPS said:[12]

> "The teeth, being of approximately equal size, have substantially equal penetration and wearing life. This

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10. Payne conceded that the general advantage to be gained by wider spacing in tooth manufacture was known to the art prior to the time of the development of the patent under consideration. (R-101, 102.)

11. Obviously, there is a certain structural strength which is realized by deleting one wide tooth rather than by spacing two narrow heel rows in alternate positions.

12. Fn. 2, supra, at 280.

increases the effectiveness and useful life of the cutters. The staggered arrangement of the teeth eliminates the tendency of the rows of teeth to track and to bounce from one row to the other as the cutter revolves, and effects uniform cutting of the entire bottom of the hole * * *."

At the time the patent under consideration was being worked upon it was well known that a reduction in the area of the tooth crests touching the bottom of the well hole would increase cutting speed and permit better cleaning.

Mr. Payne, upon cross-examination, testified as follows:[13]

"Q. Didn't your organization learn at that time, and as a result of the Fletcher development, if you reduce the number of teeth on the bottom at one time, you would get better penetration with less weight down the hole drilled?

A. Yes, we recognized if you had less tooth contact you would get more effective penetration into the formation under a given loading.

Q. So at that time, which was long before the time of this present patent, your research department knew the way to get better penetration was to reduce the tooth contact on bottom?

A. It recognized that you could get more effective penetration, but there were other things that confronted them at the time that did not permit them to utilize such a structure, reducing the tooth contact of that drastically, and it has been done in this structure.

Q. But they did reduce them quite drastically in the Scott and Wellensiek patent in the other suit?

A. That is correct."

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13. (R-81.)

Also, in the first *Williams* case, *supra*, Judge PHILLIPS in recognizing the validity of "Patent No. 1" in suit said:[14]

> "* * * It also results in the weight of the drill being brought to bear upon a lesser number of teeth as the rotation of the cutter brings the teeth in contact with the formation, thereby increasing their penetration effectiveness. * * *"

The improvement attained in "staggering" the heel teeth of the bit is such an improvement as any skilled artisan with a knowledge of the state of the art in question might be expected to make. Such an improvement is not discovery.[15]

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14. Fn. 2, supra, at 280.

It is noteworthy that Judge Phillips in this same Williams case, in ruling "Patent No. 2" in suit to be an invention touched closely upon several of the reasons now argued by plaintiff to support the validity of "Patent No. 3," when he said: "The advantages of the Scott and Garfield three-cone bit over prior-art bits are these: It has a broader base, resulting from the use of three cones instead of two, giving a more uniform distribution of weight. It permits the use of longer teeth and will carry greater weight. It produces less torque and runs more smoothly. It produces less stress and shock on the component parts of the bit and the other drilling equipment, reducing fatigue failures. It may be rotated more rapidly. It maintains better gauge, making less reaming of the hole necessary. It is more easily cleaned. It increases drilling speed approximately 100 per cent. It lasts longer." (Fn. 2, supra, at 281.)

15. That such improvement demonstrated by this patent was short of discovery or invention is implied in a degree by the testimony of Stanley C. Moore, former Field Engineer, for the plaintiff, who in describing the origin of this improvement said:

"Q. While you were a field engineer, did you have any occasion to devote any attention to any work on Hughes rock bits for interrupted heel teeth?

A. Yes, sir, I did.

Q. How did that start?

A. Well, shortly after I moved from Shreveport, Louisiana, to Midland, Texas, I would say it was the early part of 1940, I received a telephone call from Mr. Floyd Scott from Houston, suggesting to me how we might interrupt heel teeth on the O.S.Q.-2 type tricone. He gave me a detailed description over the telephone of what I should do. Then I went out into the Hughes shop at Midland and got a welder, Ben Galladay, to help me. We then went out in the dull pile and obtained two or three dull bits of the same type to practice on. We didn't want to ruin a new bit, to learn how to perform this work. * * * We then proceeded to interrupt a number of bits at the gauge end. At first, I would mark the tooth off with soap stone showing how they should be interrupted from the gauge surface inward, and after a few bits, Ben Galladay got to where he was as practiced in

II.

We now come to the counterclaim of the defendant which charges the plaintiff corporation with operating its roller rock bit business in violation of the anti-trust statutes.

Section 1 of the Sherman Act declares contracts, combinations or conspiracies in restraint of interstate trade or commerce to be illegal.[16]

Section 2 of the Sherman Act condemns monopoly it-

Footnote 15—*Continued*:

the art as I was, and we then put a number of the bits in service in the field." (R-129.)

Also, it should not be completely ignored that the plaintiff in urging the validity of "Patent No. 3" submitted into evidence a bit which incorporated only the "interruption of the heel tooth." This implies that the other elements making up this purported invention are not in use. It is well settled that a non-used patent positioned in a crowded art should not be aided by a broad interpretation of the claims. American Laundry Mach. Co. v. Strike, (C. A. 10, 1939) 103 F. 2d 453, 457; Kobe, Inc., v. Dempsey Pump Co., fn. 8, supra, at 430. The Court in the Kobe case, supra, at 430 went on to say: "And to make sure that a monopoly is not granted for mere perfection of workmanship, the courts closely scrutinize claims to combinations for improvements in a crowded art. [Citing cases.]"

16. Title 15, U. S. C. A., Sec. 1, provides: "*Trusts, etc., Restraint of Trade Illegal—Exception of Resale Price Agreements—Penalty.* Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 45, as amended and supplemented, of this title: Provided Further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor. * * *"

self together with any attempt to monopolize "any part of the trade or commerce."[17]

Section 3 of the Clayton Act makes it unlawful to contract for distribution of commodities in interstate commerce, whether patented or unpatented, where the effect of such "agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[18]

Section 4 of the Clayton Act provides that any person injured in his business or property by acts prohibited by *any* of the antitrust laws may sue for recovery of treble the amount of such damage.[19]

Counsel for plaintiff insist that this counterclaim merely raises again issues of law and fact which have previously been tried and determined; they emphatically argue that the second *Williams* case[20] recently considered by the Court

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17. Title 15, U. S. C. A., Sec. 2, provides: "*Monopolizing Trade a Misdemeanor—Penalty.* Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *"

18. Title 15, U. S. C. A., Sec. 14, provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sales of goods, wares, merchandise, machinery, supplies or other commodities whether patented or unpatented, for use, consumption or resale within the United States, or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

19. Title 15, U. S. C. A., Sec. 15, provides: "*Suits by Persons Injured—Amount of Recovery.* Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the District in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. * * *"

20. Williams v. Hughes Tool Co., (C. A. 10, 1952) 199 F. 2d 882.

of Appeals of this district, conclusively determines all the issues involved herein.

Obviously, if such be true, this case would and should be disposed of summarily without a reopening or prolonged considering by this Court of such settled issues. However, a careful comparison of the evidence in the *Williams* case, *supra*, with the evidence in the instant case unmistakably indicates that there is very little if any parallel in the kind, scope and general character of the evidence adduced although concededly almost identical legal questions are raised by the pleadings.

THE ROLLER ROCK BIT INDUSTRY.

The industry which the defendant charges the plaintiff with dominating contrary to the antitrust laws is the roller rock bit industry.

The most common method of drilling oil and gas wells is by rotating a string of pipe with a cutting tool on the lower end of the pipe known as a bit; liquid, known as drilling mud, is forced through the drill pipe to wash the cuttings from the tool, lubricate the tool and bring the cuttings to the surface of the earth. A great industry has developed in the past fifty years in the manufacture and distribution of drill bits which have rolling or rotating cutters; no other type of drill bits competes directly with roller rock bits and the commerce therein constitutes a distinct and separate industry.

Neither cable tools[21] or other ordinary types of rotary drill bits can be considered in direct competition with the roller rock bits.[22]

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21. Mr. Montrose, vice-president in charge of sales for plaintiff, testified:
"Q. What do you mean, in one sense pin it down?
A. Well, Cable Tool bits are competitive to Hughes rock bits or anybody else's rock bits, but in our competition in the rotary drilling area, we don't count Cable Tool bits as a competitive item. * * *" (DX-24, p. 9.)

22. Mr. Payne, assistant vice-president of engineering for the plaintiff, clearly ruled out the diamond bit as a competitive commodity when he said:

The peculiar and distinct advantage and useability of the roller cone rock bit is aptly illustrated by an advertisement published by Sharp-Hughes Tool Company, the plaintiff's legal predecessor, early in the development of the roller rock bit industry.[23]

"Cable tools make holes by slowly pounding the formation. There are only three types of ordinary rotary bits, *i. e.*, the Fish-tail, Diamond Point and the Rotary Shoe. Each drag or scrape their way through the formation, consequently as soon as the keen edge is worn such bits lose 80% of their cutting power. The cutting edges of the S-H Bit roll in a true circle and do not slip or drag, but crush the bottom of the hole into fine grains which are washed to the surface in the circulating water. The crushing operation preserves the edges of the Cone teeth, and enables the Cones to cut an enormous amount of hole. (See page 8.)

"The keen edge of any style of scrape bit is worn off almost instantly when rubbed on hard sand rock. The fish-tail, rotary-shoe, diamond point or inserted blade is of the scrape bit type. The principle of the Cone bit is entirely different. The edges, or the Cone points, roll in a true circle like a cone bearing, and crumble or chip away the rock. The edges give way very slowly. Frequently our bit will drill fifty feet, where a scrape bit will not drill six inches, and frequently rock formation is struck in which the fishtail or *inserted blade* will not make 2 inches a day. It is therefore more economical in the end to get the S-H Bit to

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Footnote 22—*Continued*:

"Q. You get into the diamond bit?

A. Eventually, if it is an extremely hard, abrasive type of material that responds to the diamond bit. The diamond bit is not a bit that crushes the formation like the cutter bit does. It has a plowing action, and as you rotate that diamond, that diamond acts as a little plow and cuts a path out of it as it is rotated on bottom. That type of bit would be absolutely ineffective in drilling low strength, high drillability shale." (R-111.)

23. (DX-71, p. 225.)

finish the well. Our bit will drill holes right through an emery wheel at the rate of a foot and a half per hour, *with but slight wear.* A fish-tail or *inserted blade* would be unable to drill an emery wheel composition at all.

The scrape type of bit running on rock is responsible for many of the fishing jobs, directly caused by crystalized pipe."

Similarly, it is obvious from the plaintiff's "competitive activity reports," beyond question the most accurate and complete compilation of its kind, that the roller rock bits form a competitive market all of their own.[24]

The testimony of various drilling contractors in the Midcontinent area, a rotary drilling area, clearly indicates that although any tool that is capable of making a hole in the ground theoretically may be considered competitive that in reality only roller rock bits are used.

J. W. Garr, drilling contractor in Oklahoma and Texas, with headquarters at Oklahoma City, testified:[25]

"Q. Do you run drag bits now?

A. No, sir.

Q. How long has it been since you have run one?

A. Well, we used to use them under surface holes sometimes, but we haven't run any under surface (*sic*) pipe for a long time.

Q. For ten or twelve years?

A. I would say that long anyhow.

Q. But when you did run drag bits, sometimes you might run a drag bit and sometimes a roller cutter bit. Is that right?

A. Yes, sir.

* * * * * * *

Q. Have you ever used a diamond bit?

A. No, sir.

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24. From 1940 to 1950 (DX-28a-28k).

25. (R-495, 496, 497, 498, 499.)

Q. Do you know they are used?

A. Yes, sir.

Q. You know there are a lot of oil and gas wells drilled by cable tools?

A. I used to own cable tools and operate them.

Q. Did you run them here in Oklahoma?

A. Yes, sir.

• • • • • • •

Q. (By Judge Wallace:) Mr. Garr, in regard to cable tools, how much cable tool drilling is there now comparatively?

A. Very little. They used cable tools quite a lot to drill wells in, after the rotary is run and set the cement; maybe around Bartlesville and around Okmulgee and a few places like that, they use cable tools, but all your deeper holes are rotary.

Q. Counties like Grady and Carter?

A. Yes, sir.

Q. (By Mr. Davis:) These cable tools, fish tail bits, diamond bits, are they at all similar to roller cone or roller bits?

A. Well, cable tool bits have a walking beam or studder and on the end of a drilling line to a hole, a string of balls, possibly wouldn't be over 55 or 60 feet long and work off along. They rotate principally by drill pipe.

Q. Do you consider them something of the same sort as far as digging a hole is concerned?

A. A rotary is entirely a different proposition from cable tools.

Q. And the diamond bit, it could be used in a rotary?

A. Used altogether in a rotary.

Q. But the manner in which it cuts, is it similar to a roller cone bit?

A. No, sir.

• • • • • • •

Q. (By Mr. Haight:) Then if you are drilling with a rotary rig, depending upon the formation, you then have a choice of a drag bit, a disc bit, a roller cutter bit, a diamond bit, and a diamond core bit. Is that correct?

A. Yes, sir.

* * * * * * *

Q. (By Mr. McKnight:) Mr. Haight asked you if in the rotary method of drilling you did have a choice of five or six bits. That is, the diamond bit, the fish tail bit, the drag bit, cable bit, and so on. Have you ever made any choice other than a roller cone bit to any appreciable extent?

A. No, sir."

J. J. Miller, drilling contractor, testified:[26]

"Q. Are there any other types of bits, drilling tools of any kind, that you would consider competitive with a roller rock bit, in other words is there anything else that you can do the same job with in a practical way?

A. Other than that type of bit?

Q. That's right.

A. None that I know of."

Section 2 of the Sherman Act prohibits the monopolization of "any part" of trade or commerce; this has been defined by the Supreme Court to "have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole, and to any part of the classes of things forming a part of interstate commerce."[27]

As mentioned in the *Kobe* case, *supra*, "To constitute a violation of the Act the monopolistic practices need not

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26. (R-253.)

27. Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., (1934) 293 U. S. 268, 279, 55 S. Ct. 182.

extend to an entire industry. The statute prohibits the monopolization of 'any part of the trade or commerce'."[28]

In order to have a violation of the antitrust statutes it is not essential that the article or commodity involved be completely free from alternatives or substitutes, inasmuch as almost every article, has competition in some degree from other available articles. No one would question the legal impropriety of a single automotive manufacturer dominating the sale and distribution of all automobiles, even though the purchasing public could always substitute the horse drawn wagon or buggy in the event the prices of automobiles were raised to exorbitant figures. Outstanding examples on this point are found in the following antitrust cases:

(1) *American Tobacco Co., et al.*, v. *United States*,[29] where the defendant companies were found guilty of monopolizing the cigarette market. Naturally, there were many other forms of tobacco available to the tobacco users in the form of cigars, pipes, etc.

(2) *United States* v. *United States Gypsum Co.*,[30] where a specific type and kind of plaster board was involved. Other alternatives and substitutes of wall board and plastered lath were available to the public.

(3) *United States* v. *Line Material Co.*,[31] which had to do with a single type drop-out electric fuse. Many types of automatic circuit breakers as well as other types of drop-out fuses were readily available.

(4) *Morton Salt Co.* v. *G. S. Suppiger Co.*,[32] where

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28. Fn. 8, supra, at 423. See also, United States v. Yellow Cab Co., (1947) 332 U. S. 218, 67 S. Ct. 1560; Standard Oil Co. v. United States, (1910) 221 U. S. 1, 31 S. Ct. 502; Fashion Originators Guild v. Federal Trade Commission, (C. A. 2, 1940) 114 F. 2d 80, aff. 312 U. S. 456, 61 S. Ct. 702.

29. (1945) 328 U. S. 781, 66 S. Ct. 1125.

30. (1947) 333 U. S. 365.

31. (1947) 333 U. S. 287, 68 S. Ct. 550.

32. (1941) 314 U. S. 488, 62 S. Ct. 402.

salt tablets were involved. Obviously, salt in granular form could be substituted.

(5) *United States* v. *Alcoa*,[33] which dealt with the aluminum market. Certain competition to aluminum was offered by copper, bronze and other light alloys.

Judge L. HAND indelibly drew the guiding line when he said:

> "There are indeed limits to his (the monopolist's) power; substitutes are available for almost all commodities, and to raise the price enough is to evoke them. * * * But these limitations also exist when a single producer occupies the whole market; even then, his hold will depend upon his moderation in exerting his immeditae power."

(6) *Oxford Varish Corporation* v. *Ault Wiborg Corporation*,[34] where a graining paste used in finishing wood to achieve a grained effect was in view. Of course, this paste was in competition with many varieties of paint and varnish, but it was held to be a definable subdivision of the varnish industry and thus capable of being unlawfully dominated.

(7) *United States* v. *Klearflax Linen Looms*,[35] which dealt with linen rugs. It is noteworthy that the sales of linen rugs constituted only about one-half of one per cent of the total sale of rugs in the United States; however, due to the special characteristics and properties of the linen rugs which rendered them desirable for particular purposes, they were adjudged a separate article of commerce or trade.

(8) *Kobe, Inc.*, v. *Dempsey Pump Co.*,[36] which involved hydraulic pumps used in connection with removing oil from wells. Judge PICKETT enunciated a principle in his opinion which is peculiarly applicable here, when he said:

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33. (C. A. 2, 1945) 148 F. 2d 416, 425, 426.
34. (C. A. 6, 1936) 83 F. 2d 764.
35. (D. C. Minn., 1945) 63 F. Supp. 32.
36. Fn. 8, supra, at 422, 423.

"First they say [the plaintiff] they did not have the power to create a monopoly because their pump was in active competition with other types of pumps used for the same purpose. The record illustrates that there are in use a number of methods of lifting oil from wells. The sucker or rod pump, the electric pump and the gas lift method are those most commonly used. To some extent Kobe was in competition with the manufacturers of these type of pumps. Particularly in shallow wells, all the pumps may be used under identical conditions, but each method had advantages over the other under different conditions. It is agreed, however, and the court so found, that the hydraulic pump is particularly adapted for deep wells and in wells where the hole has not been drilled exactly perpendicular. The use of the rod type pump and the electrical pump becomes impractical at some of the extreme depths to which wells are now drilled."

By using this statement as a pattern, it could forcibly be argued that the roller *cone* rock bit makes up a definable and separate part of the trade or commerce as distinguished from the *cross-roller* rock bit.[37] The roller cone rock bit is used almost exclusively at the greater depths where the harder formations are encountered, although some true competition is given by the cross-roller bit at the more shallow depths.

Mr. Scott, director of research for plaintiff, in comparing the *roller cone* bit with the *cross-roller* bit made the following differentiation:[38]

"A. Well, when you compare the cone type with the cross roller bit, you get a longer run, there is less tendency of the bit to go flat while running in various formations. It cleans itself better."

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37. Mr. Scott, plaintiff's director of research, testified that, "The majority of formations encountered in drilling oil wells seem to yield best to the *cone* type rock bit." (DX-20, p. 22.)

38. (DX-20, p. 31.)

Other evidence implies that the roller cone and cross-roller bits are not literally competitive.[39]

Mr. Montrose, vice-president in charge of sales for plaintiff, testified:[40]

"Q. Do you consider the Reed Roller Bit strict competition with Hughes?

A. No.

Q. Are you familiar with the construction and operation of what is commonly called the cross roller bit of the Reed Company?

A. Only generally.

Q. It is quite a different construction——

A. Yes.

Q. ——isn't it, from the Hughes rock cone bit that is commonly manufactured by the Hughes Tool Company?

A. Yes.

Q. In fact, in most instances, it is not very competitive with the Hughes rock bits, is it?

A. *In most areas, generally speaking, we don't think it is competitive.*" (Emphasis supplied.)

For many formations cross-roller rock bits are not considered satisfactory by the great majority of drillers.

Mr. Miller testified:[41]

"Q. How about as between roller cone bits and cross roller bits such as Reed makes, would you consider those two as competitive?

A. In certain formations, yes.

Q. Are they competitive in all formations?

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39. Mr. Meyer, employee of plaintiff for 34 years, now in the sales and advertising department, when asked why Reed was not in as strong a position competitively now as in previous years, answered: "Your cross roller type bit—Reed with their cross roller type bit has had more competition to eat into them. They have Smith and Security and those folks making cross roller bits, which naturally took business away from Reed I would think." (DX-13, pp. 34, 35.)

40. (DX-24, p. 18.)

41. (R-253.)

A. No, not in my opinion they aren't.

Q. Can you distinguish for us the places where they would be competitive with either one, could be used competitively and places where they can't be used in competition? (*sic*)

* * * * * * *

A. Well, soft formations or in some types of sand, shale, they are competitive, but in real hard formations they are not in my estimation."

However, Mr. Trigg testified:[42]

"Q. Why do you use the Hughes bits?

A. Well, we think they are the best bits, in most instances. In some places, they are not, I will say that, I think maybe in Stephens County where it is crooked hole country, we call it, there it is hard to keep the hole straight, we will use Globe or Smith *which has a flat bottom bit*, but just in normal drilling we will use a lot more Hughes bits than we do any other bits." (Emphasis supplied.)

At this time the Court believes that the roller cone and cross-roller rock bits are sufficiently interchangeable to be considered competitive and thus fall within the same "part" of trade or commerce. However, beyond controversy roller rock bits because of their design and function make up a distinct and definable "part" of commerce.[43]

III.

THE PLAINTIFF'S POSITION IN THE ROLLER ROCK BIT INDUSTRY.

The roller rock bit industry, composed principally of

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42. (R-572.)

43. When Scott, director of research for plaintiff, was examined, regarding the pre-eminence of Hughes bits, he said: "I attribute its superior performance to geometry, that is, the cone type bit drills most formations quite satisfactorily." (DX-20, p. 24.) If there is such a distinction worthy of note as between the *cone* and other roller bits, even more so there is a marked distinction between roller rock bits generally and all other types of bits.

two types of bits, the roller-cone and cross-roller, had its start shortly after 1900.

In the early 1920's the business custom of replacing worn cutter cones, worn cutter rollers, and worn bearings was an established rule; at that time it was a common practice to re-cut worn roller cones or roller cutters to provide new teeth on them.[44] In the early 1930's it became an established business practice to weld in many instances new teeth upon the cutter cones and rollers.[45] These repaired bits constituted an important part of the competition for business in this industry at that time.[46]

Throughout the years, and at the present time, the plaintiff's closest competitor in the sale of new bits has been the Reed Roller Bit Company.[47] This rivalry began in about 1915 when Clarence E. Reed, a former employee of the Sharp-Hughes Tool Company, the legal predecessor of plaintiff, began the business that eventually, in about 1919 or 1920, became the Reed Roller Bit Company.[48] Competition between these two companies was very keen up through the early 1930's, with Reed at times out-setting the plaintiff.[49]

As mentioned, up until the early 1930's, the bits sold by both the plaintiff and Reed were constructed in such a manner that they could be disassembled and repaired with the teeth on the cutter cones or roller cutters re-cut or sharpened.

Although new bits were leased or sold by the plaintiff, at the buyer's option, between about 1913 to 1915,[50] from

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44. (Scott, DX-20, p. 7.)
45. (Sanders, R-500-504.)
46. Fn. 44, and 45, supra. (DX-28a-28k.)
47. Kuldell, former president and general manager of plaintiff company, testified that Reed was the only competition he ever recognized. (DX-9, p. 13.) (Also, see Meyer, DX-13, p. 24.)
The plaintiff and Reed have their principal offices in Houston, Texas.
48. Chicago-Pneumatic Record, pp. 500, 591. (DX-7.)
49. (Meyer, DX-13, p. 19; Kuldell, DX-9, p. 31; DX-44b, 44f, and 68.)
50. (DX-71, p. 233.)

1915 until the early 1930's the plaintiffs bits were sold outright; during all of this time these bits were repaired, being furnished with new or re-cut cones by the plaintiff or other companies in the repair business.[51] In the early 1930's the general economic and competitive conditions became very severe; for several years the plaintiff operated at a loss,[52] and for a time lowered prices to the point that new cones were sold at the market price of re-cut ones.[53]

In about 1933 both the plaintiff and Reed altered their bit designs and produced bits that were no longer adapted for disassembly. These bits were known as "unitized" bits.[54] The plaintiff continued to manufacture "cone" bits and Reed continued to manufacture "cross-roller" bits, thus retaining the fundamental difference in design which had existed between the products of these two competitors from the outset.[55]

At the time the unitized bit came into prominence, the plaintiff started the practice of distributing drill bits under a "lease" agreement rather than selling them outright.[56] The lease agreement appears on the delivery ticket which is signed by the "lessee" when the bits are delivered at the rig; this agreement provides:

> "Hughes roller rock bits and all core bit heads are never sold but are leased. When the original cutter teeth

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51. (DX-20, pp. 6-11.)

52. (DX-31a, 31b, 31c; Dietrich, DX-22, p. 33.)

53. (Meyer, DX-13, pp. 6-8.)

54. (Mobley, R-309, 310; Kuldell, DX-9, pp. 9, 10.)

55. The cross-roller cutter extends completely across and covers the complete bottom of the hole. The Reed-Humason cross-roller type is also distinguishable from the Hughes cone bit in that it is a flat bottom bit. (DX-PT-M.)

56. The use of the lease agreement in substantially its present form was begun in May of 1934. However, this was preceded by the practice begun in about January of 1932, of marking bits as "Property of the Hughes Tool Co." (DX-2[13].)

Although "leased" instead of sold the inventory records are treated as if the bits are sold, inasmuch as the inventory is reduced at the time of leasing. (Child, DX-12, p. 5; Garmany, DX-19, p. 13.)

and/or bearing have served their useful life, the user will surrender the bits to Hughes Tool Company upon request. In accepting delivery, the user agrees not to surrender any of the tools mentioned above to other than duly authorized representatives of the Hughes Tool Company."

The evidence in this case establishes beyond question that since about 1936 the plaintiff has utterly domineered this industry.[57] At such time the Reed Roller Bit Company, the plaintiff's only major new bit manufacturer competitor, began to follow exactly the prices set by this plaintiff on all sizes of roller rock bits.[58]

The 7th Edition of the Oil Weekly published in 1936 indicates that on August 1, 1935, Reed changed the price of its rock bits in every comparable size of bit to correspond precisely with the prices charged by plaintiff.[59] This identical price setting becomes even more significant when it is recalled that the bits produced by the plaintiff and by Reed are fundamentally different in design and construction.

At about this same time the remaining new bit manufacturers, a small minority, began to follow the prices set by the plaintiff.

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57. As shown by the "competitive activity reports," the competition of Reed dropped off considerably by 1936. (DX-32a, 34d, 35, 38, 62.)

58. Presumably, at first, the Reed prices were different. (See last paragraph and written notation on DX-66.) Also, see (DXT-39a) which gives the Hughes lease price list for its rock bits effective May 25, 1934, the date of the lease agreement.

John Best, purchasing agent for Lucey Products Corporation, testified:

"Q. Do you know of any instances that there was a price war between Hughes and any of these other bit manufacturers in the past twenty years?

A. You are asking a rather leading question.

Q. Well, answer the question.

A. I will answer it this way, Hughes has established the prices. If anyone wants to meet their competition they meet it by equalling that price. (DX-27c, p. 49.)

59. (DX-30b, p. 1080.)

Seemingly, there was some agreement regarding these prices as Reed was reported to be "living up" to this price increase one hundred per cent. (DX-33b, 1st par.)

This complete price control has continued up until the present time; the plaintiff has raised its prices at irregular intervals between 1936 and the present; Reed has consistently followed the plaintiff within twenty-four hours; and, the remaining minority manufacturers have followed within several weeks.[60]

A brief summary of the price changes in this industry reveals:

(1) that in 1936 there existed an exact agreement between plaintiff's and Reed's prices throughout the various range in sizes of bits.[61]

(2) that the next change in prices occurred when the plaintiff raised its prices on January 7, 1947; Reed followed on January 8th; H. C. Smith Tool Company followed on January 15th; Chicago Pneumatic Tool Company followed on February 1st.[62]

(3) That the next change in prices took place on July 24, 1948, when the plaintiff increased its prices; Reed followed on July 25th; Smith followed on August 1st; the other manufacturers followed soon thereafter.[63]

(4) that the next price increase in this industry occurred on December 1, 1950, when the plaintiff and Reed both changed prices on the same day; the other manufacturers followed at once.[64]

In this connection another factor strikes the Court with great force. The testimony is uncontradicted that a consid-

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60. (See Kennedy, DX-27a, p. 24.)

61. Fn. 59, supra.

62. (DX-30c, 30d, 30e, 30f, 30g.)

This 1947 change was a general repricing and not a fixed percentage increase. Regardless, it was followed exactly and immediately by Reed, and soon thereafter by the others.

63. (DX-30h, 30i, 30j.) (See testimony of Miller at R-469-471.)

The 1948 change was a 12% raise in all bit prices. Reed followed Hughes exactly 24 hours later to the minute. (See Best, DX-27, pp. 43-47, and attached Exhibits 1 to 4.) (Also, McMahan, DX-27, pp. 64, 65, and attached Exhibits 5 and 6.)

64. (DX-30k, 30l, 30m, 30n, 30o.) (See Miller, R. 469-471.)

erable amount of time and effort must be put forth before a price change can be effected; it is impossible to immediately bring about a change without painstaking research and preparation; the evidence further shows that the information regarding the date and amount of the price changes are carefully guarded and that the plaintiff changes its prices suddenly and without notice to the public;[65] the obvious purpose for being secretive is to prevent a rush by the bit purchasers to lay in store bits at the lower prices. However, an anomaly appears when an attempt is made to reconcile the above facts with the further fact that Reed, in spite of such secrecy, is able to change its prices to correspond with the plaintiff's prices within twenty-four hours from the time the plaintiff's changes are made public information.

Mr. Hamaker, vice president in charge of sales for Reed, testifying by deposition, confirmed the fact that a great deal of time and effort of necessity must go into the preparation leading up to a price change, but went on to admit that the price which the plaintiff sets actually determines Reed's prices.[66] This pointedly illustrates the absolute dominance enjoyed by the plaintiff in regard to the fixing of prices in this industry.

The unlawfulness of being in a position of price control is capably described by Judge L. HAND in his opinion in the *Alcoa* case:[67]

> "• • • Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater power to fix

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65. (See Meyer, DX-13, p. 34, and Clarke, DX-18, p. 24; Garmany, DX-19, p. 11.)

66. Mr. Hamaker originally testified that Reed takes a considerable amount of time in deciding upon a price change, with several executives carefully studying the labor and material costs (DX-25, pp. 9,10), but subsequently admitted that Hughes' prices are the *sole governing factor*. (DX-25, p. 19.)

67. Fn. 33, supra, at 427.

prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers they are really partial monopolies."

Thus, it is the *power* to control prices which the law forbids, regardless of whether such power is used to realize excessive profits. The plaintiff unmistakably has such power.[68]

The additional feature which makes the plaintiff's conduct even more reprehensible is that by these controlled price raises the plaintiff has increased its profits almost steadily from very little if any profit in the early 1930's to over 53% net profit of gross sales in 1951; thus, a net profit before taxes of over 53% was realized by the plaintiff on each bit sold in 1951.[69]

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68. In American Tobacco Co. v. United States, fn. 29, supra, at 811, the Supreme Court said: "* * * The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so. * * *"

69. In response to defendant's interrogatory No. 1 (DX-2d) the plaintiff submitted to the Court the following profits before taxes, as a percentage of gross sales, from 1940 through 1951; these figures were prepared by Paul Garmany, plaintiff's accountant, and were taken from the plaintiff's books:

The actions of plaintiff and of Reed which have occurred repeatedly inescapably indicate that the plaintiff and Reed have a concerted scheme to fix prices on their bits; and, that in reality there is not *true* price competition between them; the inevitable result of the plaintiff's complete dominance is that from a business viewpoint Reed may have no other practical alternative.[70]

From the introduced evidence this Court holds a stead-

Footnote 69—*Continued*:

1940	30.8%
1941	32.4
1942	23.4
1943	25.4
1944	26.4
1945	12.7
1946	32.3
1947	39.6
1948	42.2
1949	41.5
1950	48.4
1951	53.1

Also, in 1950 the plaintiff had an income of about $225,000 from the sale of dull bits for their scrap metal value; from the evidence it is not clear whether this income is included in the above mentioned figures. (Garmany, DX-19, p. 25.) Obviously, if such was not included the profit realized by plaintiff was a little more than shown above. (See DX-64 for a comparison of Hughes' profits with those realized by other manufacturers.)

70. Of course, no collusion between the two companies is admitted. However, it is more than a coincidence that the plaintiff and Reed can both secretly spend a considerable length of time in preparation and then raise their prices simultaneously for identical amounts.

The casual opinion of Col. Kuldell, former president and general manager of the plaintiff company, in response to a line of questions dealing with the extent, if any, Hughes Company personnel cooperated with Reed, may approach the truth of the matter:

> "A. I imagine that our sales manager, who was Mr. Brown, and theirs then was—wasn't it Rex Hamaker: I don't know who it was, but I am pretty sure that when one published a book of prices, whoever published its catalog first probably let the other one see it and said, 'This is what we are going to do. You can do what you want to about it' * * *"

Kuldell went on to say:

> "A. I am sure they discussed business all the time. They were very close friends, too. * * *" (DX-9, p. 39.)

Significantly, it has always been Hughes who first published the catalog, or at least who first raised the prices.

fast conviction that the plaintiff in fact has no other true price competition than that which arises from retipped bits; at this time quantities of dull bits and retipped bits are in interstate competition with new bits and continue to move in a somewhat restrained market at prices far below those of new bits.

That the plaintiff undeniedly is in a monopolistic position in the roller rock bit industry and that "retipped" bits offer the last vestige of price competition, is further verified by the plaintiff's own records dealing with the competitive picture of the industry from 1940 through 1950; although, admittedly such summaries are not, and could not be, absolutely complete, they are the most accurate and most dependable data in existence to establish this fact.[71]

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71. Other evidence corroborates the fundamental accuracy of these summaries showing percentage of new bit sales by the plaintiff:

(1) "Q. Do you know, Mr. Hyatt, of any better way to get an overall picture of the rock bit competition of Hughes than the one that you use at the present?

A. No, I don't know of a better way. If I did, why, we sure would like to know about it." (DX-18, p. 85.)

(2) John Best, purchasing agent for the Lucey Products Corporation, testified that from the billings he has handled he would estimate that the plaintiff had between 75% to 80% of the total bit business. (DX-27c, p. 43.)

(3) W. G. Rudd, Sales Manager for Lucey Products Corporation, estimated that of all the bits invoiced in the common size, 75% would be plaintiff's. (DX-27d, p. 55.)

(4) R. M. McMahan, Secretary of the Bovaird Supply Company, testified that plaintiff had "five to eight times as much as the Reed Roller Bit," and "four to seven times as much as all the others put together." (DX-27e, pp. 66, 67.)

(5) J. W. Garr, driller in Oklahoma and Texas, testified that about 90% of his bit business goes to the plaintiff. (R-480.)

(6) Meyer, in his testimony, confirmed that plaintiff sold over 90% of the bits used in drilling deep, hard formations. (DX-12, p. 36.)

The following is a recapitulation of such records:[72]

	NEW BITS			RETIPPED		
Year	Hughes	Reed	Others	Hughes	Others	Total
1940	129,458	27,137	7,747	10,877	1,682	176,901
%	73.3%	14.1%	4.0%	6.0%	0.9%	—
1941	149,378	30,160	10,160	17,667	2,104	209,379
%	71.3%	14.3%	4.8%	8.14%	1.0%	—
1942	98,110	23,678	5,043	11,698	1,589	140,118
%	70.0%	16.8%	3.5%	8.3%	1.0%	—
1943	135,305	16,814	7,669	15,495	1,580	176,863
%	76.5%	9.5%	4.3%	8.7%	0.8%	—
1944	195,753	29,976	10,729	23,613	2,160	262,230
%	74.6%	12.0%	4.0%	9.0%	0.8%	—
1945	200,059	34,933	14,086	22,945	1,852	273,875
%	73.0%	12.7%	5.1%	8.3%	0.6%	—
1946	214,594	29,420	19,940	28,479	1,886	294,322
%	72.9%	9.9%	6.7%	9.6%	0.6%	—
1947	267,930	36,769	31,454	28,144	2,975	367,272
%	72.9%	10.0%	8.5%	7.9%	0.8%	—
1948	334,333	33,014	39,144	34,576	4,495	445,561
%	75.0%	7.4%	8.7%	7.7%	1.0%	—
1949	349,763	33,110	46,303	43,854	7,282	480,313
%	72.8%	6.8%	9.6%	9.1%	1.5%	—
1950	430,220	40,525	42,252	50,756	5,968	569,721
%	75.5%	7.1%	7.41%	8.9%	1.05%	—

Thus, in 1940 out of approximately 177,000 bits used, the plaintiff sold about 129,500 of them or 73.3%; this supremacy has continued up through 1950 wherein out of about 570,000 bits used, the plaintiff sold over 430,000 of them. From this resume' it also appears that in 1950 plaintiff's retipped bits used amounted to over 10,000 more than the total number of new bits sold by Reed, the plaintiff's largest new bit competitor; it is manifest that such retipped bits, although not large in amount percentagewise, which sell for about $40.00 each, constitute the last true price competition confronting the plaintiff's new bits, the most popular size of which sells for about $160.00.[73]

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72. The early competitive activity reports establish that even prior to 1940 the plaintiff had around 70% of the business in the roller rock bit industry. (DX-32a, 32b, 34d, 38.)

73. This by implication illustrates the tremendous financial advantage enjoyed by the plaintiff over its competitors. On the 430,000 odd bits sold by plaintiff in 1950, its gross income doubtless approached $68,000,000; its net profit, before taxes, doubtless exceeded $34,000,000. Unquestionably,

Although, counsel for plaintiff has somewhat questioned the fact that "retipped" bits are literally in competition with new bits in the roller rock bit industry, the Court cannot take such a contention too seriously.[74]

Mr. Montrose, vice-president in charge of sales for plaintiff, disclosed that from a selling standpoint the retipped bits were *strictly* competitive.[75]

Also, one of the most probative pieces of evidence establishing that retipped bits are competitive comes from the plaintiff's own records, which in effect amounts to an admission; for ten years the plaintiff kept an accurate count of all retipped bits used, along with new bits used, and headed up such compilations "Competitive Activity Report Summaries."[76]

From the general competitive viewpoint not only has the plaintiff's *hold on the bit market from the standpoint of number of bits sold percentagewise* gradually increased,

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Footnote 73—*Continued*:

size in and of itself does not violate the antitrust statutes; however, size is a pertinent consideration along with other evidence which tends to prove exclusion of competitive sales and price control. See United States v. Swift & Co., et al., (1932) 286 U. S. 106, 116.

74. Mr. Dietrich, executive-vice president of plaintiff, in giving his deposition, said:

"Q. This retipping competition being so negligible, is it profitable to bring suit?

A. I don't know that it has ever been termed negligible. At a time when it might be termed negligible, it could be a threat to us.

Q. A threat to what?

A. A threat to our business.

Q. A decrease in your business?

A. Yes, a threat to our volume." (DX-22, p. 23.)

75. (DX-24, p. 9.)

76. (DXT-28a-28m.) A further indication lies latent in the fact that Mobley induced C. F. Williams to "lay off" retipping bits for a short period in 1947, on the promise that if Hughes licensed this activity, Mobley would recommend Williams as one of plaintiff's agents. (DX-6, p. 104.)

Judge Wyzanski in United States v. United Shoe Machinery Corp., (D. C. Mass., 1953) 110 F. Supp. 295, 344, in analyzing the dominant position held by United Shoe and in pointing out the market weaknesses said among other things, "*And, finally, there is no substantial substitute competition from a vigorous secondhand market in shoe machinery.*" (Emphasis supplied.)

but as shown by the figures previously referred to the number of bits used yearly during the ten year period between 1940 and 1950 has increased over three-fold. This is all the more startling when it is realized that the plaintiff's profit per bit increased from 30.8% to 53.1% of the individual bit selling price during the very time of this tremendous increase in volume of business.

The Court is an enthusiastic adherent of our American philosophy of free-enterprise; and, has absolutely no sympathy for that minority which take the position that the capital investor should not receive a fair recompense for his financial investment and for the application of his personal ingenuity. Our economy is bottomed upon the sturdy conviction that the aggressive entrepeneur deserves liberal compensation where his rugged individualism has resulted in raising our standard of living or in creating a new commercial demand. The Court has no disposition to discourage the very heart-beat of our way of life by approaching the question of permissible profit in a miserly fashion. However, by any norm used, the exorbitant profit realized by the plaintiff corporation, can in no way be justified. The Court seriously questions whether any person, associated with or removed from the plaintiff company, can in the utmost of *good faith* urge that such excessive profit is the plaintiff's logical reward for having given a fine product to the oil and gas industry. Such a stand makes sheer mockery out of the true goal and purpose of our capitalistic system—the perpetuation of "free competition."

IV.

The Lease Agreement.

The plaintiff's absolute domination of the roller rock bit industry has been achieved and maintained by intensive engineering research, an aggressive patent policy coupled with wide-spread patent litigation, an abusive use of the "lease" agreement, an invasive sales policy and an em-

bracing of each opportunity for expansion with such readiness as to discourage competition.

Of the means just enumerated the zealous and abusive use of the "lease" agreement has been one of the most effective.[76a]

This "leasing" by the plaintiff has a two-fold object and result.[77]

(1) It enables the plaintiff to make certain that the majority of such bits are never repaired and used again in competition with the plaintiff's new bits.

(2) It permits the plaintiff's field organization to pick up the used bits of plaintiff's manufacture, examine them, and return some to plaintiff's laboratory in Houston for further examination, including physical, metallurgical and chemical analyses.

The Court has not ignored or by this opinion attempted to ride roughshod over the many previous decisions which have held the "lease" agreement to be a lawful and legitimate business device.

The "lease" agreement was held to be valid in *Robertson Rock Bit Co.* v. *Hughes Tool Co.* in which the Court said:[78]

> "As to the leasing agreements and the practices of recovering used bits under them, the district court properly held them valid."

76a. Plaintiff in its argument has questioned the defendant's right, as a third person not a party to the lease agreement, to challenge its validity. Certainly, no privity of contract need exist. Any person injured as a result of the violation of the anti-trust laws has a right to challenge the violator together with the violator's methods which have been used to bring about such injury.

77. The Reed Roller Bit Company and many other minority new bit manufacturers have followed the same practice of leasing bits which plaintiff originated; as a result competition from repaired bits has been reduced to a very low figure. Even prior to the time that other minority manufacturers began this practice, inasmuch as the plaintiff and Reed had the lion's share of the new bit business competition from the repair source was effectively suppressed.

78. (C. A. 5, 1949) 176 F. 2d 783, 785. Cited with approval in Williams v. Hughes Tool Co., fn. 2, supra, at 281. Cert. denied 341 U. S. 903.

In *Williams* v. *Hughes Tool Company*[79] Chief Judge PHILLIPS in his well-reasoned opinion said:

> "The reasons which motivated Hughes in leasing, rather than selling its bits, and in requiring the return therefor for inspection, testing and research are obviously to enable Hughes to improve the quality of its bits, to provide the proper bit for drilling in particular formations or in a particular area, to provide valuable information to drillers who use the Hughes bits, to maintain the high standard of its products and protect their reputation. Failures of retipped bits would tend to injure the reputation of Hughes' bits. The lease agreement and the practice of recovering used bits, as stated by the Fifth Circuit in *Robertson Rock Bit Co.* v. *Hughes Tool Co.*, is practical, reasonable and fair."

In the second *Williams* case[80] Judge BRATTON went on to say:

> "Williams presents only one specification of points for reversal of the challenged order. Its substance is that since the patents have expired there is not justification for continuing the injunctions restraining Williams from interfering with the property rights of Hughes in its leased bits by retipping or rebuilding the teeth thereon. * * * It is admitted frankly in the brief of Williams that if these two features of the injunction had been completely separate and independent holdings, the expiration of the patents would not affect the feature relating to interference with the property rights of Hughes in its leased bits by retipping and rebuilding teeth thereon. But the two features of the injunction were separate and independent. The equitable right of Hughes to protection against infringement of its patents was quite separate and apart from its system of leasing its bits rather than selling them. Hughes was

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79. Fn. 2, supra, at 285.

80. Williams v. Hughes Tool Co., (C. A. 10, 1952) 199 F. 2d 862, 863.

entitled to restrain infringement of its patents whether the bits had been leased or sold. And if the practice of Williams in receiving from lessees bits manufactured by Hughes, retipping them, and building new teeth thereon, constituted systematic encouragement to lessees to breach valid and effective provisions in the leasing agreements, Hughes was entitled in equity to restrain such wrongful conduct without regard to whether the bits were manufactured under patents or not. The two rights were separate and distinct. Neither was dependent upon the other. Neither was an adjunct of the other. * * * "

These decisions establish beyond controversy that the "lease" agreement in and of itself is not illegal but *may* be a perfectly proper means of maintaining control over a manufactured article where the owner does not wish to sell outright. Also, these previous holdings find in effect that from the evidence introduced at the various trials there was no convincing evidence that the Hughes Tool Company was operating in violation of the antitrust laws.

Not only is this Court bound by these decisions of the Court of Appeals of this District, but in fact has no criticism to make of the results reached therein.

However, the courts previously have not had the benefit of the evidence placed before this Court, in the instant case, resulting in proof of the complete dominance enjoyed by the plaintiff in the roller rock bit industry. It is elementary that a lawful instrument, such as the lease agreement has heretofore been found to be, cannot be used to realize an unlawful end, such as a violation of the antitrust laws.[80a]

80a. In the recent United Shoe Machinery case, fn. 76, supra, at 344, where a somewhat analogous lease arrangement was in view, the Court had this to say: "* * * Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. * * * In one sense, the leasing system and the miscellaneous activities just referred to * * * were natural and normal, for they were, in Judge Hand's words, 'honestly industrial.' 148 F. 2d at page 431. They are the sort of activities which would be engaged in by other honorable firms. And, to a large extent, the leasing practices conform to longstanding traditions in the shoe machinery business. Yet,

As pointed out by Judge L. HAND in the *Alcoa* case:[81]

> "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."

As mentioned by Mr. Chief Justice WHITE in *Standard Oil Co.* v. *United States*:[82]

> "* * * practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and the remedying of the evils which it produced."

With no persuasive evidence of a violation of the antitrust statutes the previous courts could, entirely consistent with the fundamental concepts of our law, recognize the validity, in and of itself, of the lease agreement.

Footnote 80a—*Continued*:

they are not practices which can be properly described as the inevitable consequences of ability, natural forces, or law. They represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster. They are contracts, arrangements, and policies which instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market. *While the law allows many enterprises to use such practices, the Sherman Act is now construed by superior courts to forbid the continuance of effective market control based in part upon such practices.* * * *" (Emphasis supplied.)

81. Fn. 33, supra, at 809.

82. (1911) 221 U. S. 1, 56, 31 S. Ct. 502. Also, in United States v. Besser Manufacturing Co., et al., (D. C. Mich., 1951) 96 F. Supp. 304, 313, the court said: "While it must be admitted that not all of these acts are prohibited, nevertheless, we must review them in the broad panorama of other acts and their association with each other to note, not only the effect—but to pierce the veil for evidence of intent. [Citing cases.] (Aff. 343 U. S. 444.)

However, once a Court, such as here, is literally flooded with a maze of testimony and other evidence leading to the inevitable conclusion of monopoly it is then a rather simple —almost automatic, deduction to identify the vehicles used to arrive at such monopoly.[82a]

Three pivotal points, from the position of introduced evidence, distinguish the effect and character of the evidence in the instant case from all other cases which previously involved the plaintiff herein:

(1) The Court for the first time has been shown beyond dispute that the plaintiff is selling 75% or more of all the roller rock bits used in drilling today.[83]

(2) The Court for the first time has been shown, from the plaintiff's own books, that in 1950 on over 430,000 bits sold the plaintiff realized a profit of 48.4% per bit; and that this profit was increased to 53.1% per bit in 1951.

(3) The Court has had the benefit of the testimony of a former executive in the plaintiff corporation who was closely associated with the object and use of the plaintiff's lease agreement. This former employee has given plausible testimony on the true object and purpose of the lease agreement, heretofore not disclosed to the Courts.[84]

82a. In United Shoe Machinery case, fn. 76, supra, at 323, the Court said:

"The effect of United's leasing system as it works in practice may be examined from the viewpoint of United, of the shoe manufacturers, and of competitors potential or actual. * * * (c) United's lease system makes impossible a second-hand market in its own machines. This has two effects. It prevents United from suffering that kind of competition which a second-hand market offers. Also it prevents competitors from acquiring United machines with a view to copying such parts of the machines as are not patented, and with a view to experimenting with improvements without disclosing them to United."

83. 75% actually is a very conservative figure. DX-23k shows that in 1950 the plaintiff sold 75.5% of the roller rock bits used; included in this competitive figure were Hughes retipped bits which accounted for an additional 8.9%. Eliminating the retips from consideration readily shows that the plaintiff is actually selling between 80 and 85% of all *new* roller rock bits sold.

84. The plaintiff has forcibly argued that the testimony given by Mobley is unacceptable inasmuch as (1) much of it is in the nature of hearsay and (2) all the information acquired was gained while he occupied the relationship of attorney-client and that consequently is privileged.

The first contention can be disposed of by the Court merely giving

Unquestionably, as previously found by the Courts, the plaintiff used the lease agreement to aid in analyzing and improving its product.[85] However, this is not the primary purpose of the lease agreement. This Court is satisfied that the paramount aim of the lease agreement as used by the plaintiff was to promote sales rather than to achieve engineering perfection.[86]

The evidence indicates that the plaintiff in thinking of a new method of marketing, sent Mr. Mobley, a young lawyer, to work with Mr. Brown, the vice-president *in charge*

Footnote 84—*Continued*:

its assurance that no testimony in the nature of hearsay was relied upon by the Court. The second contention is much more serious. The Court diligently appraised the assertion that Mobley in testifying was guilty of a breach of ethics and gave evidence based upon privileged communications from a client. However, it must be noted that although Mobley possessed a legal degree and represented the plaintiff as an attorney in certain routine replevin and sequestration actions, that he was primarily an executive aiding in the promotion of sales and working closely with the sales department. (Kuldell, DX-9, p. 30.) Although, doubtless, his legal background was helpful, he was strictly an employee, in the field, a good part of the time. While upon the witness stand Mobley evidenced sincere desire to not breach any moral duty owed the plaintiff from a professional standpoint, but convincingly indicated that his testimony was not based upon information received as a lawyer, in the common use of the term, but from knowledge obtained as a regularly salaried non-professional business employee. (Read, R-280-300.)

85. This same observation and study could easily be made by the plaintiff without technically retaining title to the bits. The majority of the bits examined are examined in the field. All the drillers which testified readily agreed that the plaintiff could have free access to these used bits, regardless who held technical title. Furthermore, it is significant that not over one to two per cent of the bits run go back to Houston. (Payne, R-88, 89.)

As observed by Judge Huxman in his dissent in the first *Williams* case at 287: "• • • It is conceded that only a small per cent of the bits are capable of being retipped. Permitting retipping of this small number of bits would in nowise interfere with any analytical operations appellee [Hughes] might wish to conduct." (Fn. 82, supra.)

86. Mr. Ayers, senior vice-president of the plaintiff, indicated that the purpose of the lease was to do away *completely* with retipping. (DX-4, p. 132.)

The clear import of Mobley's testimony is that the sole purpose of the lease is to *control* the bits for the sales department, and had little or nothing to do with engineering research. (R-323. Also, see R-294, 296.)

Col. Kuldell testified that Mobley and the *sales manager* Brown formulated the lease agreement (DX-9, p. 29); Mr. Meyer corroborated the fact that the sales department originated the lease agreement. (DX-13, p. 19.)

of sales.[87] Mobley was then sent into the field to do investigative work and report his results, particularly to Mr. Brown, in order to provide sufficient information for the new plan or program.[88] Mobley reported his field investigations to Col. Kuldell, general manager, and to Brown; the three of them then made the final decision regarding what to do. Mobley was consulted on the policy of the company respecting the new distribution scheme; a policy was determined to retain control over the bits for the purpose of preventing rebuilding of the bits, as distinguished from a mere policy to get the bits back.[89] The reason for this action was to control the dull bits to prevent them from being repaired and entered into competition with new bits, rather than to protect the plaintiff's reputation or to further the plaintiff's engineering research. Mobley was primarily associated in his work with sales manager Brown and general manager Kuldell; and, his contact with the engineering department was merely incidental.[90]

The factual information which Mobley obtained in the field convinced plaintiff's management that the lease agreement was necessary to prevent the competition from rebuilding or reconditioning bits in some way; in this there was no thought regarding engineering research, but it had "all" to do with sales competition.[91]

Mobley was given very broad latitude in working with the sales force to develop the lease idea to the utmost.[92] The only reason the lease agreement did not expressly preclude rebuilding was because in the early stages of the lease agreement this leasing was unpopular and the general resistance, which already existed, would have increased to the point that sales would have been seriously impaired.[93]

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87. (Mobley, R-282, 294.)
88. (Mobley, R-282, 283, 287, 323.)
89. (Mobley, R-296; Kuldell, DX-9, pp. 30, 31.)
90. (Mobley, R-281, 282, 295, 296, 323.)
91. (Mobley, R-323.)
92. (Mobley, R-346.)
93. (Mobley, R-344.)

To exclude *retipping* competition, Mobleys activities in the field were directed to in every-way build up the tradition of the lease agreement so that absolute control over the used bits was retained.[94] Many actions of sequestration and replevin were brought by the plaintiff against the individual retippers in order to drive the retippers "To the bushes, take their business off the front street to the back street."[95]

After the war the plaintiff reactivated its field force for the purpose of stopping retipping. A special assignment department with Mobley at the head was organized.[96] The ob-

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94. (Mobley, R-294; Scott, DX-20, p. 13; Kuldell, DX-9, pp. 29, 30.)

There is testimony that the plaintiff's senior vice-president, Mr. Ayers, considered the department under Mobley's supervision after 1939 as a special police force department; that this police force took advantage of every incident that could be used to libel or slander the small retipping operation; any minor incident that might damage the plaintiff's reputation, regardless how small, would be highly publicized and exaggerated to help justify plaintiff's opposition to retipping and thus bring about the planned program of the plaintiff. (Mobley, R-325.)

There is testimony that the plaintiff's sales manager conceived the idea that it would help plaintiff to have the field personnel of plaintiff aid peace officers to recover stolen bits (Mobley, R-361, 362); that Brown considered it not only a good idea to stop thieving; but in taking such bits back to the contractor, it gave the plaintiff's salesmen an opportunity to sell the idea that *retippers* were stealing bits; and, that this idea aided the plaintiff considerably. (Mobley, R-361, 362.)

95. Some of the sequestration actions brought in the District Court of Wichita County, Texas, were: (1) Roy W. Dickey, defendant, No. 43,080-A (DX-7, p. 812); (2) J. W. Ross, defendant, No. 43,189-A, 1947 (DX-7, p. 816); (3) J. H. Bingham and Carl C. Kennett, defendants, No. 43,184-A, 1947 (DX-7, p. 815); (4) L. R. Bowers, defendant, No. 43-834-A, 1947 (DX-7, p. 817); (5) Harry A. Adams, defendant, No. 43,849-A, 1947 (DX-7, p. 818); (6) J. H. Bingham, defendant, No. 43,850-A, 1947 (DX-7, p. 819); (7) Raymond Graham, defendant, No. 43,837-A, 1947 (DX-7, p. 819).

Replevin actions brought in the District Court of Oklahoma County, State of Oklahoma, include: (1) Allen Leeper, an individual, doing business as the Wabash Welding Co., defendant, No. 115209, 1947 (DX-7, p. 1207); (2) Herman R. Metcalf, d/b/a Oil Field Welding Service, and Lynn Doxcie, defendants, No. 117598, 1947 (DX-7, p. 1214); (3) O. E. Bacon, James F. Gore and Bill Lepper, defendants, No. 117118, 1948 (DX-7, p. 1223); (4) Allen Leeper, an individual, doing business as the Wabash Welding Co., defendant, No. 115288, 1948 (DX-7, p. 1233); (5) Keith Kritton, d/b/a Kritton Welding Service, defendant, No. 117597, 1948 (DX-7, p. 1243). Also, a replevin action was brought in the District Court of Payne County, Oklahoma, against B. F. Conaghan, d/b/a Conaghan Equipment, and H. G. Ladd, defendants, No. 15,203, 1947 (DX-7, p. 769).

96. (Ayres, DX-6, p. 131; Hays, DX-14, p. 6.)

jective of this special department, from 1946 until 1949, was to locate and pick up *dull bits* of the plaintiff's manufacture, particularly dull bits which were in the possession of persons other than the original lessees.[97]

THE ENFORCEMENT OF THE LEASE AGREEMENT.

The retipping of bits, as such, began to flourish about 1937.[98] Not only did small welders take part in this activity, but a number of the large oil companies[99] and independent drilling contractors began to take advantage of the savings which could be made by using retipped bits.[100]

Included in the group of drilling contractors using retipped bits were prominent drillers such as Olsen, Noble, Mabee, Jones and Loffland.[101] In fact, the plaintiff's competitive activity report of January, 1939, shows that Noble and Loffland, the two largest contractors, were the two worst offenders.[102]

Mr. Garr, a drilling contractor of Oklahoma City, drills in Oklahoma and Texas; in the past he has drilled in the mid-continent area for many major companies, including Sinclair and Continental. He uses about 25 to 30% retips of Hughes dull bits and other manufacturers. Garr has re-

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97. (Hays, DX-14, pp. 5, 6; also, Read, p. 11.)

Apparently, the plaintiff did not so vigorously oppose retipping during the war years as at other times because of the labor and material shortage; the plaintiff had great difficulty in keeping up with orders and worked a great deal of overtime. (Mobley, R-407.) Obviously, for the time, it was to the plaintiff's advantage to permit retipped bits to help fill the need.

98. (DX-32a, 32b, 33b.)

99. (DX-32b, pp. 2, 3; DX-33a; Mobley, R-347, 349; DX-53a, 1st par.; DX-38; DX-46; DX-62.)

100. As an example of the economic saving involved where retipped bits are used and to emphasize that retipped bits are *strictly* competitive, the testimony of Joe Trigg, well established drilling contractor, is very interesting. Trigg owns eight rigs; he drills for large oil companies like Sinclair, Tidewater and Phillips, and has a "bit cost" of around $200,000 a year. He testified that he uses from 10 to 22½% of retips in his drilling operations and estimates he has saved about $30,000 a year on his bit cost by doing so. (R-551, 567, 574.)

101. (Mobley, R-347; DX-33a; 33b; DX-62.)

102. (DX-62.)

tipped since 1941 with plaintiff's knowledge and plaintiff has never brought suit.[103] Garr has his own retipper and has used other retippers; the plaintiff has never complained to Garr about any of the leased bits being retipped.[104]

Jim Stephens, drilling superintendent of Phillips Petroleum Company, testified that Phillips is familiar with the lease agreement but has continued to retip with plaintiff's full knowledge and acquiescence.[105] He excuses this technical violation of the lease agreement upon the ground that Phillips, as a practical matter, is entitled to get all the economical service out of the bits, whether bought or rented; he considers retipping to be merely a repair of a rented tool.[106]

Fred Morgan, Oklahoma City drilling contractor, does most of his work in Oklahoma. Although familiar with the lease agreement, Morgan has been using about 25% retips for years; and, the plaintiff has never attempted to enforce the lease agreement against him.[107]

Joe Miller, a drilling contractor since 1906, testified he has used about 80 to 90% Hughes' bits since 1933, and, that he has used about 30% retipped bits. Miller testified further that he was *once* threatened by an employee of plaintiff but nothing was ever done.[108]

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103. (Garr, R-479,483.)

104. (Garr, R-497.) In response to a question by the Court, Garr stated that the plaintiff does not always pick up the same number of dull bits as new bits delivered inasmuch as if Garr wants to retip some of the bits he does so. (R-488.)

105. (R-450, 454.)

106. (R-455.) Phillips tool pushers have told the field men of plaintiff they could not pick up dull Hughes bits which Phillips wanted to have retipped. (R-455.)

107. (R-671, 675.) In response to a question by the Court, Morgan stated that plaintiff has continued to lease him bits even though plaintiff for 10 years has known Morgan to be retipping dull bits. (R-677.) Morgan, also, testified he has saved around $100,000 throughout the years by using retipped bits.

108. (R-249.) Miller testified further that practically every driller uses retipped bits of Hughes and other manufacturers and that he knows of no one who at some time hasn't used retipped bits; such has been a common practice throughout the oil industry. (R-250, 251.)

Joe Trigg, drilling contractor, testified that he retips dull bits of plaintiff which he has obtained under the lease agreement and that the plaintiff has lodged no objection. In all the years that Trigg has been retipping the plaintiff has never sued him for patent infringement or for violation of the lease agreement, although the plaintiff was well aware of his retipping activities.[109]

No legal action was brought, or even threatened, against such large oil companies as Gulf, Carter and Magnolia, during the very time they were doing a great deal of retipping;[110] many of the companies continued to retip without any threat of legal action by the plaintiff. Magnolia, for example, had three retippers working constantly in the West Texas area; at this same time Gulf and Carter were also retipping, and the plaintiff never threatened any of them with court action.[111] Furthermore, Skelly Oil Company, Phillips Petroleum Company and numerous other oil companies *have been* for a number of years and *still are* retipping dull bits; although, the plaintiff has attempted to discourage such activity in every way possible no legal action has ever been suggested to these large purchasers of the plaintiff's product, who are well aware of the existence of the lease agreement.[112]

The fact that the plaintiff has never enforced its lease agreement through legal channels against any of these large purchasers of new bits, but only against the small independent retipper, again emphasizes that the lease agree-

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109. In one instance, plaintiff brought a replevin suit against Clint Williams of Tonkawa for some of Trigg's bits which Williams has obtained from Trigg for retipping in 1949 or 1950; however, Trigg got them back immediately without ever going to trial. (R-557, 558.)

110. (Mobley, R-398.) Magnolia refused to quit retipping and upon threatening to quit purchasing new bits of plaintiff, Brown backed off because Magnolia was a good customer. (Mobley, R-352.)
Mobley and sales manager Brown went to Humble Oil Company after the advent of the lease and persuaded them to stop retipping. However, Gulf was retipping and did not stop until about 1946. (Mobley, R-347, 349.)

111. (Mobley, R-398, 399; Haight stipulation, R-665.)

112. (Mobley, R-353, 354; Stephens, R-452; Garr, R-480-485; Trigg, R-555-559, 567-568; Morgan, R-671, 675.)

ment is being used primarily to further sales rather than to advance the workmanlike quality of the bits.[113]

If the lease agreement had been brought into being for the sole purpose of aiding the plaintiff engineeringwise and if the plaintiff had been firmly convinced of its right and title to the leased bits, the lease agreement should have been enforced in an undiscriminating manner against any and all violators; obviously, the most desirable and helpful engineering information could be gained from the heavy purchasers and users of the plaintiff's bits.

The resultant effect of failing to use the lease agreement to suppress retipping activity is vividly pointed out by a study of the sales in the Illinois area, from the plaintiff's own "competitive activity" reports.[114] For some reason the Illinois retippers were left unmolested, relatively; as a consequence the competition of retipped bits arose to as high as 35 to 40% of the total bits used in that territory; this is in sharp contrast with the West Texas area where the lease agreement was rigidly enforced and where retipping never exceeded about 3% of the total number of bits used.[115] Doubtless, the difference in drilling formations had something to do with this wide disparagement in the competitive figures.[116] However, it is also evident that not

113. In answer to a question by the Court on whether the field men of plaintiff informed the purchaser that he was signing a lease agreement, Mobley testified that the representatives of the plaintiff did not dare go that far; and, that the plaintiff never insisted that a purchaser sign under threat of not receiving more bits from the plaintiff, unless he was a very small purchaser. (R-352.)

114. Mobley, in testifying on the number of bits sold in Illinois, referred to DX-29 and explained that the plaintiff in 1940 sold in excess of 33,000 bits, which was 73% of the total used in Illinois that year. From 1941 through 1945 plaintiff's total bit sales were decreasing slightly, but the drilling operations were not diminishing. (R-400) He went on to testify, referring to DX-29, that in 1940 retipping was 19.56% of the total numbers of bits used, and gradually increased through 1945 until it reached 33.9% of the total bits used.

115. (Mobley, R-356-357.)

116. After 1940, in the West Texas Field the percentage of new Hughes bits sold was always above 80%; however, retipping of dull Hughes bits was never permitted to exceed 2.5% for West Texas (Mobley, R-403); and, Hughes worked hard to keep it "clean." (Mobley, R-404, 495.) The

only is the retipper in direct competition with the new bit manufacturer, but it is further clear that the enforcement of the lease agreement is the primary means by which this competition from the retipper is suppressed.

The effectiveness, saleswise, of the enforced lease is aptly illustrated by the content of a letter written by the plaintiff's Illinois salesman to the plaintiff's sales manager which stated that it would be a good idea to have Mobley come to Illinois and do something about the retipping because the "one-horse outfits" were already half scared and held down as much as possible.[117] This same salesman later wrote that the plaintiff ought to do something about the retipping in Illinois and suggested that an "example" be made of some of the welders.[118] Again, it is obvious that there is little connection between engineering research and the practical use to which the lease agreement is put. This history of limited enforcement merely corroborates the testimony of Mobley on the true purpose behind the lease agreement.

The plaintiff has used the courts to protect it from competition from repaired and retipped bits, by bringing suits against those who were in direct competition with the plaintiff who were not purchasers of the plaintiff's product; thus, this specific source of competition, the second-hand bit market, has been not only held in check but has been gradually eliminated. Hand in hand with this direct attack through the courts, the plaintiff has indirectly discouraged users of retipped bits, who also purchase new bits from plaintiff, from the continued use of retipped bits in all in-

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Footnote 116—*Continued*:

West Texas field has a harder and deeper formation than in Illinois; however, down to about 3000 feet the bit usage is about the same. (Mobley, R-403, 404, 413.)

117. (DX-34a; DX-34b, 34c, 72c, p. 3.)

118. (DX-34d, under "Remarks.") With the exception of Illinois, retipping would come and go, and if it became important in an area, and the plaintiff did not want retipping to make headway, they would work diligently to suppress it. (Mobley, R-494-495.)

stances where mere persuasion, short of the threat of legal action, held any opportunity for success.

The inevitable result has been not only to radically suppress competition from the independent repairmen and retippers, such as the defendant herein, but has been to discourage companies and drillers from retipping in view of court decisions holding such to be in violation of the law. Significantly, as the plaintiff's position in the roller rock bit industry became more dominant the plaintiff has become progressively more insistent that the sanctity of the lease agreement not be impinged. This Court will not legitimize these unconscionable business tactics which have resulted in the reaping of inordinate profits.

V.

FACTOR'S, OTHER THAN THE LEASE AGREEMENT, WHICH HAVE ENABLED THE PLAINTIFF TO OBTAIN AND MAINTAIN ITS POSITION OF DOMINANCE.

The plaintiff's position of dominance has not been attained per chance but has been the direct result of an intelligently planned and perfectly executed business policy; many of the individual acts could not, in and of themselves, be considered unlawful; in fact, when viewed individually, many of the plaintiff's acts have been commendable and would be praised from a practical business viewpoint.[118a] However, when all such acts taken together result in a company arriving at an unlawful position of business control, then such acts cease to be commendable; they are not even acceptable. Some of the factors, other than the abusive use of the lease agreement, previously discussed, which have brought about the plaintiff's violation of the antitrust laws are:

(1) *An intensive scientific and engineering research and development program.*

118a. As mentioned in the United Shoe Mach. case, fn. 76, supra, at 297:

"* * * Though these practices and methods have not been predatory, immoral, nor on their face, discriminatory as between different customers, they have operated as barriers to competition. * * *"

This is an outstanding example of intelligently planned action which ostensibly contains many admirable features.

A portion of the testimony of L. L. Payne, the then assistant-chief engineer of plaintiff, in the first *Williams* case gives a graphic picture of the thoroughness with which the plaintiff has handled its development program:[119]

"The Hughes Tool Company has seven major divisions in the United States. The new bits are kept either in the divisions' warehouses or in branch warehouses. As used bits are picked up, they are returned by the Hughes man who is serving that particular area to his head-quarters whether it be in the division office or one of the branch offices. This man is the first Hughes man to see the bits picked up at the rigs. The Oklahoma City division is a fair example. The field man that services the rigs picks up the dulls if he is quartered here, and returns them to the warehouses here in Oklahoma City. If there are any of those particular dulls he has picked up which, in his opinion, should be forwarded into Houston for further examination, he will call it to the attention of his division or district manager, and also to the attention of the division engineer, who is headquartered in this division so that they cannot only acquaint themselves with the particular aspect as being considered of that particular bit or bits, but also to insure that the proper information is transmitted to the Houston office, so that the engineering department can examine the product upon their arrival.

"Used bits sent to the laboratory at Houston are returned on a return ticket so we can identify them for any reports which are submitted. After passing through these various hands, the bits are set up for examination by the engineers who are responsible for the development and improvement of Hughes bits. There we observe the bits, compare the condition of the bits along

119. (DX-6, pp. 71-73.)

with the report that is submitted and in conjunction with the metallurgical department which decides what metallurgical examination should be made, and if another investigation should be made of the bit, other than metallurgical.

"If there is any evidence about the bit that it doesn't have the quality represented in our specifications, we call the responsible man from the manufacturing division to present the evidence to them.

"The field men keep records of the performance of rock bits with respect to the footage drilled and the hours run, along with other pertinent facts and information, the weight carried, rotary speed and gallons of fluid circulated, formations drilled, etc. In addition to markings as to size, and cone type, each bit has a serial number stamped on it. The records will reflect to whom each bit was leased and the location on which the bit was used. It may not always reflect how much the bit drills in how many hours because we are not permitted 100% to collect that information. In the majority of cases, the information would be complete.

"Our field salesman (*sic*) have that history in their files, at their disposition, to study the performance of these bits. If they are trying out a different type of bit in a given formation, they have the past history, numerous records of other types of bits that have been used in those formations, and they are able to make a comparative performance check. It helps them evaluate the merits of the new structure, or change in structure. They know, from observance and a study of those records the right type of bit to be used in these different formations, and they offer that knowledge to the trade in the interest of reducing their drilling costs.

"From our records, one can determine the number of bits that have been used to drill a particular well and in most instances the footage of each bit. The field

men have information as to formations encountered and the time factors in drilling of the well. All of this information of the Hughes Tool Company.[119a]

"The Hughes Tool Company has around 175 men in the field doing the work I have just described. At Houston, Texas, in the Research Engineering Department and the Products Engineering Department, there are about 20 graduate engineers directly engaged in the development of bits and other men with practical experience in the metallurgical group in the laboratory running drill rigs, and those working in engineering planning whose responsibilities are to fully investigate and coordinate the effect of any change with all other departments that will be affected in the manufacturing division. We have seven division engineers who work on development of rock bits and other products."

Implicit in the foregoing testimony is the inescapable conclusion that in addition to the scientific development which the plaintiff has achieved, the plaintiff has also been placed in an extremely potent position from the standpoint of sales approach. This has given the plaintiff an accurate and continual feeling of this industry's pulse; such surveillance in reality has placed all would be competitors at an insurmountable disadvantage.

The Court's statement in *United States* v. *General Electric Co.* in condemning an analogous system, which it termed "industrial surveillance" is appropriate here:[120]

"Although these activities in collating information may have been innocent isolated by themselves and

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119a. Mr. Trigg, drilling contractor, testified:

"Q. The Hughes Tool Company service. What service do they give in addition to leasing the bit?

A. They give us service on all wells which have ever been drilled anywhere almost. You can call them and get information as to any wells that were ever drilled, as to the number of days it took to drill the well and the number of bits used on the well.

Q. And type of bits?

A. Yes, and footage they made, if you wanted it." (R-486, 487.)

120. (D.C. N.J., 1949) 82 F. Supp. 753, 901.

might be readily countenanced as between genuine competitors, here they emanated from a dominant force in the industry to envelope its controlled allies and the few remaining independe. manufacturers. In that light, viewed in their aggregate, they represent a picture of espionage and policing activity. This surveillance was not for the ordinary purpose of sharpening competition but rather designed to reinforce and maintain the domination of the industry; and to inhibit the growth of existing, and abort the birth of, new competition. These activities, part of the general pattern of conduct, do not of themselves rise to the level of a violation of the Sherman Anti-Trust Act but they disclose a manifestation of monopoly in the incandescent electric lamp industry by General Electric."

(2) *An aggressive patent policy coupled with widespread patent litigation.*

From the beginning the plaintiff has not only aggressively obtained all possible patents related to this industry, but has actively used the fact of their existence in sales promotion and in challenging competition.[121]

For example, Sharp-Hughes, the plaintiff's legal predecessor, publicized that over one hundred and sixty-four patent claims had been allowed in the United States alone and that patents had been obtained in over fifteen foreign countries. This publicity was accompanied by the statement that:

> *"Any infringement or attempt to make our bit, or any part, will be vigorously prosecuted to the limit of our resources."*[122]

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121. Plaintiff has owned or had an interest in 128 patents relating to drill bits; of these, 20 have been issued since January 1, 1935, which pertained to roller cone bit structures. (DX-2a.) Of these, the plaintiff has never granted any licenses. (DX-2-5.)

122. (DX-71, p. 232.)

This announced policy has been diligently carried out.[123]

It should also be observed that the control of the industry in question has been achieved by means of a large number of improvement or combination patents relating to various minor and separate features of the rock bit structure, and not primarily by means of basic patents. The "No. 3 Patent" in suit, which the Court has held to be invalid is an extreme example of the effort the plaintiff has exerted to tie down and keep in check competition by the use of the individual patent monopoly.[124] Although, doubtless, the plaintiff believed some of its patents were infringed at the time this action was instituted, the Court believes the real purpose of this infringement action was to further its existing monopoly and to eliminate the defendant as a competitor.

(3) *An invasive sales policy together with an embracing each opportunity for expansion and market control with such readiness as to discourage and eliminate potential competition.*

For example, sales manager Brown conceived the idea of taking delivery away from the supply houses and having the plaintiff's sales force deliver direct to the customers in order that such sales personnel would regularly visit all active drilling rigs.[125]

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123. Patent infringement actions have been brought against (1) Owen, et al., (C. A. 5, 1941) 123 F. 2d 950; (2) United Machine Company, et al., (D. C. Okla., 1939) 35 F. Supp. 879; (3) International Supply Co., (C. A. 10, 1931) 47 F. 2d 490; (4) Chicago Pneumatic, (C. A. 10, 1950) 180 F. 2d 97; (5) Williams Iron Works Co., (C. A. 10, 1940) 109 F. 2d 500; (6) Williams, fn. 2, supra.

In addition, at least 4 lawsuits were settled by an agreement that the defendant would no longer repair bits of plaintiff's manufacturer. These contracts were with (1) A. F. Spangler Company, a corp., Oklahoma City (DX-7, pp. 22, 23, 24, 25); (2) Charles J. Owen, doing business as Eastland Boiler and Welding Shop, of Eastland, Texas (DX-7, pp. 25-27); (3) Williams Iron Works Co., a corp., Tonkawa, Oklahoma (DX-53); (4) The Thompson Tool Company, of Texas (DX-61).

124. There has not always been a unanimous approval of those earlier patents. See dissent by Judge Huxman, in the first Williams case, fn. 2, supra, and dissent by Judge McDermott, in the International Supply Co. case, fn. 123, supra, at 494.

125. (Mobley, R-309; Kuldell, DX-9, p. 25.)

The sales policy cannot be divorced from the use of the lease agreement by the plaintiff. Although the abusive manner in which the lease agreement has been used has been considered previously by this Court, its connection with the sales program can bear re-emphasis. The following testimony of Mobley who had the primary responsibility in correlating the practical use of the lease agreement with sales promotion, is pertinent:[126]

"Q. Well, if you had a lease agreement and the lease agreement precluded retipping, why didn't you simply enforce it or write in the lease agreement that you can't do it, and enforce it?

A. It wasn't quite the popular thing. At first people hadn't been sold on the idea. There was general resistance to the idea of a lease when I started.[127] After all, we were dealing with our customers, in other words they had to buy our products, and/or lease or what—they had the money and we wanted the money and we wanted them to have the use of the bit. I tried to do the reasonable thing and that was sell the idea, do it through the sales force if I could or any other method, tried to convince them that it would be to their best interest for the lease business to go across, tried to show them in any way that I could, that that was the thing to do for their own benefit in the matter of selling them on the idea. Now the methods they used were many.

Q. Tell us some of them.

A. Well, I hardly know where to start. Well, to begin with, the idea that was developed, this is probably the tail end of it, but after a while we tried through the use of sequestration, I believe you call it replevin here, to make the retippers go to what we said 'to the bushes,' take his business off the front street, move it to the back street, tried to give the people the idea that

126. (Mobley, R-344, 345, 346.)

127. This is understandable inasmuch as at the time of this change from sale to lease the price remained the same.

he was not a responsible man such as the Hughes was, and better off not to use products that were made by a person such as they were. And in addition, we sold the engineering idea as much as we possibly could. That was one good idea that we used, to fit themselves for engineering data, to improve it. We used other means to demonstrate to the people that because of the irresponsibility of the people who generally handled these things, that there were too many of them, too valuable, to induce dishonesty. We generally sold them the idea that the Hughes Tool Company would develop where it was possible a better bit. * * *"

Other aggressive acts by plaintiff of a questionable character and which demonstrate the energetic and systematic manner in which the plaintiff has eliminated would be competitors are:

(a) During the 1920's the plaintiff owned the Caddo Rock Bit Company. At such time Caddo received a 15% royalty from Reed under the Humason patents. These royalty reports were turned to the plaintiffs sales department to aid in sales promotion.[128] Significantly, the correspondence in connection with these royalty reports often carried specific comments or pencilled notations regarding the competitive position of Reed, the only real competitor of plaintiff.[129]

(b) Prior to the time that plaintiff brought suit against the Williams Iron Works, a salesman of the plaintiff learned

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128. (Dietrich, DX-22, pp. 13, 14.)

129. For example, sales manager Brown asked the salesmen "to state whether these sales in your opinion are the result of intensive sales effort on the part of Reed or whether their tool actually is better adapted to formations encountered than ours (DX-44a). The replies of the salesmen clearly show that the plaintiff's interest was not in checking the accuracy of the royalty reports, but was centered upon the question of competition (DX-44d). Thus, salesman Schaefer answered Brown's letter on Reed royalty reports by a discussion of the relative merits of the bits of the two companies (DX-45); salesman Long mentioned, "I hate to think what would happen if Reed reduced their price in line with ours" (DX-66); and, he identifies Reed's customers (DX-69). In another letter Brown said, "Please exercise 'eternal vigilance' and wherever possible win over users of Reed material to our side." (DX-44d.)

that Williams was working on a thin financial margin; this employee of the plaintiff approached the First National Bank of Tulsa and induced them to discontinue credit to Williams on the strength of orders from certain drilling contractors.[130]

(c) When Chicago Pneumatic Tool Company entered into the field as a manufacturer and distributor of roller cone rock bits, in about 1928, Col. Kuldell, president of plaintiff, made every effort to remove them from the competitive field. Kuldell, sent several letters to Mr. Schwab, head of Bethlehem Steel Corporation, stating that inasmuch as Chicago Pneumatic was one of Mr. Schwab's personal companies, that Schwab should see to it that Chicago Pneumatic went no further into the new bit business in competition with Hughes. Kuldell threatened to cut off Hughes purchases of steel from Bethlehem, which amounted to over $1,000,000 in 1928, unless Chicago Pneumatic ceased such competition.[131]

The words of L. Hand in the *Alcoa* case dealing with the aluminum company's contention it had never excluded competitors is peculiarly applicable at this point:[132]

> "It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every new comer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to maneuvers not honestly industrial, but actuated

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130. (DX-47) Mobley testified that Walker, the salesman who did this, was in the Tulsa sales department of plaintiff; that Mobley knew that Walker intended to do this, inasmuch as he had discussed it with Walker, and Mobley not only failed to tell him to refrain from such action, but was in fact pleased he did it. (R-374.)

131. (DX-49b.) Although the attitude of Kuldell from a business standpoint may be understandable, his action illustrates the aggressive attitude which has characterized the rise of the plaintiff to its present position of dominance in the industry.

132. Fn. 33, supra, at 431.

solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidation as it was designed to prevent."

VI.

CONCLUSION.

This Court concludes that the plaintiff in the instant case has violated Section 2 of the Sherman Act which condemns any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monoplize any part of the trade or commerce among the several states, or with foreign nations."[133]

Congress' object in enacting this and related anti-trust sections was "to secure competition and preclude combinations which tend to defeat it."[134] The statute is "based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."[135]

The plaintiff throughout the trial and in its brief to the Court has attempted to justify its position in the industry and its high percentage of profit by saying such has merely resulted because of the superior bit produced by the plaintiff and due to the plaintiff's own business thrift.

Such a contention was disposed of by Judge HAND in the *Alcoa* case when he said:[136]

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133. As mentioned in the Kobe case, fn. 8, supra, at 430: "As to the intent or the purpose of monopolies, it is not necessary that the proof include specific intent in a criminal sense. If there is a unification and concentration of power and control over a commodity, this in itself may make a prima facie case of intent and purpose to exercise illegal restraints and monopolize. It is sufficient to satisfy this requirement if the consequence of a defendant's conduct or business arrangements results in a monopoly. [Citing cases.]"

134. International Harvester Co. v. Missouri, (1914) 234 U. S. 199, 209, 34 S. Ct. 859.

135. United States v. Trenton Potteries, (1927) 273 U. S. 392, 397, 47 S. Ct. 377; United States v. American Oil Co., (1923) 262 U. S. 371, 388, 43 S. Ct. 607; United States v. Yellow Cab Co., (1947) 332 U. S. 218, 226, 67 S. Ct. 1560.

136. Fn. 33, supra, at 427.

"* * * True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, stimulated every possible demand. No doubt, that would be the way of dealing with the matter, although it would imply constant scrutiny and constant supervision, such as courts are unable to provide. Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. * * *"

Judge HAND went on to say:[137]

"We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself in the passage quoted in the margin showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.*

*(MARGIN:) "If the concerted powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities * * *." 21 Cong. Record, 2457.

"The popular mind is agitated with problems that may disturb social order, and among them all none is

137. Fn. 33, supra, at 432.

more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life. * * *" 21 Cong. Record 2460. See also 21 Cong. Record 2598.

It is further the opinion of this Court that the "effect" achieved by the lease agreement of the plaintiff is clearly within the broad language of Section 3 of the Clayton Act, which states in part:

> "* * * where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

As demonstrated by the introduced evidence, this lease agreement is being used to eliminate the last true price competition which remains in the roller rock bit "line of commerce," that of the "retipping" of dull bits.[138] As can be deduced from the "competitive activity reports"[139] the retipping competition has been held to a little over 8% of total bits used; if such retipping should be absolutely prohibited, as vehemently urged by the plaintiff corporation, the plaintiff could expect future sales of over 83% of the

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138. It is interesting to note that Judge Murrah, in his dissent in the first Williams case, fn. 2, supra, at 290, without the benefit of the evidence which has been shown this Court, made the following observation: "Undoubtedly, the leasing arrangement, when construed to prevent retipping, will have the effect of restraining interstate trade and commerce in the bits to the extent at least that the retipped bits are excluded from the market. And, competition in the bits will thus be lessened to the same extent. * * *"

139. (DX-23a-23k.)

total new bits sold, even taking into account the sales of cross-roller bits, which as shown previously, are not completely competitive.

The Court has arrived at the following conclusions of law:

(1) The Court has jurisdiction of the parties and the subject matter hereof.

(2) United States Letters Patent No. 1,856,627 was good and valid at law until it expired on May 3, 1949. United States Letters Patent No. 1,983,316 was good and valid until it expired on December 4, 1951. Both of these patents were infringed by the defendant prior to the expiration dates of the patents. However, inasmuch as the plaintiff is operating in violation of the antitrust laws, no recovery of damages by the plaintiff from the defendant should be permitted.[140]

(3) Inasmuch as the plaintiff is in a position of monopoly and of restraint of trade contrary to the laws of the United States, the plaintiff should be denied any relief under its "lease" contracts and any of its patents relating to roller rock bits, as to the defendant, until such time as the said unlawful monopoly is dissolved and its dominance relinquished; and, pending such event the plaintiff should be enjoined from asserting or claiming any violation of said "lease" or infringement of said patents.

(4) The defendant should recover treble the amount of damage he is able to show resulted from the plaintiff's unlawful monopoly.[141]

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140. Inasmuch as this Court has determined that the "No. 3 Patent" in suit is invalid, there is no question regarding its infrigement; however, even if this "No. 3 Patent" had been found to be valid, as the Court views this case, there would be little if any practical difference in the ultimate disposition of this case. Clearly, a patent is in itself a limited monopoly, authorized by law, if used without abuse. However, as stated by Justice Brandeis, "The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition." Standard Oil Co. (Ind.) v. United States, (1931) 283 U. S. 163, 174.

141. At the outset of this case it was determined that the issues of liability and damage would be tried separately. Thus, if no violation of the antitrust laws was found there would be no need to introduce evidence on the damage question.

(5) The defendant should recover attorney's fees for the prosecution of his counterclaim.

(6) The defendant should recover all costs expended upon all phases of this action.

Dated this 30th June, 1953.[142]

(Signature stamped) W. R. WALLACE,
United States District Judge.

VII.

FINDINGS OF FACT.

1. The plaintiff, Hughes Tool Company,[143] is a Delaware corporation, with its principal office and place of business in Houston, Texas.

2. The various counts of the complaint and counterclaim all arise out of the same transactions.

Count I of the complaint arises under the Patent Laws of the United States.

The counterclaim arises under the laws of the United States dealing with monopolies and restraints of trade.

3. The defendant, R. W. Ford, is a citizen of Ada, Oklahoma, in the Eastern District of Oklahoma.

4. This litigation is concerned with the roller rock bit industry.

The most common method of drilling oil wells consists of rotating a string of pipe with a cutting tool, known as a bit, on the lower end of the pipe; liquid, known as drilling mud, is forced through the drill pipe to wash the cuttings from the bit, lubricate the tool and bring the cuttings to the surface of the earth.

5. In the past fifty years a great industry has developed in the manufacture and distribution of drill bits

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142. Attached hereto and made a part of this opinion are specifically enumerated "Findings of Fact." (These findings are designated as Section VII.)

143. Hereinafter referred to as Hughes.

which have rolling or rotating cutters; no other type of drill bits competes directly with roller rock bits and the commerce therein is a distinct and separate industry.

6. The plaintiff corporation, previously wholly owned by the late Howard R. Hughes, Sr., and now wholly owned by Howard R. Hughes, Jr., is engaged in the manufacture and interstate distribution of roller rock drill bits and other tools used in the drilling of oil and gas wells.[144]

7. One of the founders of Hughes, Howard R. Hughes, Sr., took out a number of patents on roller rock drill bits; in about 1913 the Sharp-Hughes Tool Company, a Texas Corporation, was formed; the following year its name was changed to the Hughes Tool Company; in about 1936 the Texas corporation was re-incorporated under the laws of the State of Delaware.

8. Hughes is, and at the time of the filing of the complaint herein was, the owner of Fletcher Patent No. 1,856,627, Scott and Garfield Patent No. 1,983,316, and the Scott, Garfield and Cockrum Patent No. 2,333,746, and has the right to sue for past infringement of each of these patents.

9. The validity of Patent No. 1,856,627, which expired May 3, 1949, after this suit was filed, was not questioned by the defendant.

10. The defendant retipped partially worn down teeth of drill bits made in accordance with Patent No. 1,856,627; such retipping constituted an infringement of this patent.

11. The validity of Patent No. 1,983,316, which expired December 4, 1951, after this suit was filed, was not questioned by the defendant.

12. The defendant retipped partially worn down teeth, which were still interfitting, on drill bits made in accordance with Patent No. 1,983,316; such retipping constituted an infringement of this patent.

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144. The plaintiff corporation is also engaged in the moving picture business, the aircraft business and the brewery business.

13. Patent No. 2,333,746 relates essentially to the deletion or cutting away of alternative ends of teeth in the wide heel row of a roller drill bit used for drilling earth formations. A countless number of different spacings and arrangements of teeth on drill bits is shown by the many prior art patents in the record. The fact that the teeth should in effect be "staggered" or irregularly arranged to avoid tracking in the rock teeth formation on the well bottom was known prior to the advent of this patent (see Fletcher Patent No. 1,856,627). The fact that a reduction in the area of the tooth crests touching the bottom of the well would increase cutting speed and permit better cleaning was also known prior to this patent. (See Scott *et al.*, Patent No. 1,983,316). The advantages gained by originally manufacturing a "wide spacing" of the teeth was also known to the art. (See R. 101, 102.)

In view of this knowledge and the general state of the art, Patent No. 2,333,746 fails to disclose an invention; this includes claims 1 and 4 of the said patent.

14. The roller rock bit industry, composed principally of two types of bits, the roller-cone and cross-roller, started shortly after 1900.

15. In the early 1920's the business custom of replacing worn cutter cones, worn cutter rollers and worn bearings was well established; at that time it was a common practice to re-cut worn roller cones or roller cutters to provide new teeth on them. In the early 1930's it became an established business practice to weld in many instances new teeth upon the cutter cones and rollers. At that time these repaired or second-hand bits constituted an important part of the competition for business in this industry.

16. Throughout the years, and at the present time, Hughes' closest competitor has been the Reed Roller Bit Company,[145] which has its principal office in Houston, Texas.

This rivalry began about 1915 when Clarence E. Reed,

145. Hereinafter referred to as Reed.

a former employee of the Sharp-Hughes Tool Company, began the business that eventually, in about 1919 or 1920, became the Reed Roller Bit Company.

17. Competition between Hughes and Reed was very keen until the early 1930's, with Reed at times outselling the plaintiff.

18. Until the early 1930's, the bits sold by both Hughes and Reed were constructed in such a manner that they could be disassembled and repaired with the teeth on the cutter cones or roller cutters re-cut or sharpened.

19. New bits were leased or sold by Hughes, at the buyers' option, between about 1913 to 1915; however, from 1915 until the early 1930's, Hughes' bits were sold outright; during all of this time these bits were repaired, being furnished with new or re-cut cones by the plaintiff or other companies engaged in the repair business.

20. In the early 1930's the general economic and competitive conditions in this industry, as in many industries, became very poor; for several years Hughes operated at a loss, and for a time lowered prices to the point that new cones were sold at the market price of re-cut cones.

21. In about 1933 both Hughes and Reed altered their bit designs and produced "unitized" bits which were no longer adapted for dissembly.

Hughes continued to manufacture "cone" bits and Reed continued to manufacture "cross-roller" bits, thus retaining this fundamental difference which had existed between the products of these two competitors from the outset.

22. At the time the unitized bit came into prominence, Hughes started the practice of distributing drill bits under a "lease" agreement rather than selling them outright.

The lease agreement appears on the delivery ticket which is signed by the lessee at the time the bits are delivered at the rig; this agreement provides:

"Hughes roller rock bits and all core bit heads are

never sold but are leased. When the original cutter teeth and/or bearing have served their useful life, the user will surrender the bits to Hughes Tool Company upon request. In accepting delivery, the user agrees not to surrender any of the tools mentioned above to other than duly authorized representatives of the Hughes Tool Company."

23. This "leasing" by Hughes has a twofold object and result.

(1) It enables Hughes to make certain that the majority of such bits are never repaired and used again in competition with the plaintiff's new bits.

(2) It enables Hughes' field organization to pick up the used bits of Hughes' manufacture, examine them, and return some to plaintiff's laboratory in Houston, Texas, for further examination, including physical, metallurgical and chemical analyses.

24. Reed has followed the same practice of leasing bits as has Hughes; since about 1936 these two companies have had all but a fractional share of the new roller rock bit business; competition from repaired and retipped bits has been reduced to a very low percentage; at the present time the remaining minority new bit manufacturers also lease their bits.

25. At the time production and distribution of the unitized bit began, Hughes ceased to repair bits or to sharpen or re-cut the cutter cones, and proceeded to daunt all others from doing so.

26. Hughes has diligently attempted to repossess bits of its manufacture in the possession of persons, not parties to the lease agreement; however, no legal action has been taken or even threatened against regular purchasers of Hughes' bits, drilling contractors and oil companies, who are parties to the lease agreements.

27. Hughes has discouraged purchasers of its products from violating the lease agreement but has never in-

sisted, by threat of legal action, that such parties to the lease agreement, refrain from retipping. Hughes has continued to supply such customers with new drill bits, knowing that these purchasers have previously retipped Hughes bits and may continue to do so.

The indirect pressure by Hughes upon these purchasers has increased in intensity as Hughes' market control has become complete.

28. The defendant has ignored this lease, and has bought and sold these bits; the defendant is now engaged in drilling oil and gas wells and in his drilling operations has frequently used drill bits of plaintiff's manufacture and ownership, not leased to him, but originally leased to others retipped, and then sold to the defendant.

29. Hughes has been in a dominant position in the roller rock bit industry since about 1936. At such time Reed, the principal new bit competitor of Hughes, began to follow exactly the prices set by Hughes on all sizes of bits; about this same time all other new bit manufacturers began to follow the prices set by Hughes.

30. Hughes' prices for its roller rock bits are not fixed by their cost.

31. Since 1936 Hughes, at irregular intervals, has increased its prices, and in all instances has been the first manufacturer to change its prices; in all such cases Reed has, within 24 hours, changed its prices on the various sizes of bits to correspond exactly with Hughes' prices; within several weeks of each of these changes by Hughes the remaining minority new bit manufacturers have changed their prices to also correspond identically with Hughes' prices.

32. A considerable amount of time and effort must be put forth before a price change, by any manufacturer in this industry, can be effectuated. Hughes changes its prices suddenly and without notice to the public; and, Reed without exception, within 24 hours, has changed its prices to correspond exactly with Hughes'. These actions, which have occurred repeatedly, unmistakably indicate that Hughes

and Reed conspire to fix their prices and that there is no true price competition between them.

33. By raising the prices of its bits, at irregular intervals, between 1936 and 1951, Hughes increased its net profits, before taxes, to over 53% of its gross sales.

34. From 1940 through 1951, Hughes' net profit, before taxes, as a percentage of gross sales has been as follows:

Year	Per cent of sales	Year	Per cent of sales
1940	30.8%	1946	32.3
1941	32.4%	1947	39.6
1942	23.4	1948	42.2
1943	25.4	1949	41.5
1944	26.4	1950	48.4
1945	12.7	1951	53.1

35. Competition in the roller rock bit industry in the United States since 1950 has been as follows, as shown by plaintiff's own records:

	NEW BITS			RETIPPED		
Year	Hughes	Reed	Others	Hughes	Others	Total
1940	129,458	27,137	7,747	10,877	1,682	176,901
%	73.3%	14.1%	4.0%	6.0%	0.9%	—
1941	149,375	30,070	10,160	17,667	2,104	209,379
%	71.3%	14.3%	4.8%	8.4%	1.0%	—
1942	98,110	23,678	5,043	11,698	1,589	140,118
%	70.0%	16.8%	3.5%	8.3%	1.0%	—
1943	135,305	16,814	7,669	15,495	1,580	176,863
%	76.5%	9.5%	4.3%	8.7%	0.8%	—
1944	195,753	29,976	10,729	23,612	2,160	262,230
%	74.6%	12.0%	4.0%	9.0%	0.8%	—
1945	200,059	24,933	14,086	22,945	1,852	273,875
%	73.0%	12.7%	5.1%	8.3%	0.6%	—
1946	214,594	29,420	19,940	28,479	1,886	294,122
%	72.9%	9.9%	6.7%	9.6%	0.6%	—
1947	267,930	36,769	31,454	28,144	2,975	367,272
%	72.9%	10.0%	8.5%	7.9%	0.8%	—
1948	334,233	33,014	39,144	34,576	4,495	445,562
%	75.0%	7.4%	8.7%	7.7%	1.0%	—
1949	349,763	33,110	46,302	43,854	7,283	480,312
%	72.8%	6.8%	9.6%	9.1%	1.5%	—
1950	430,220	40,525	42,252	50,756	5,968	569,721
%	75.5%	7.1%	7.41%	8.9%	1.05%	—

36. Hughes domination of the roller rock bit industry

is such that it can extract exorbitant profits without giving rise to price competition from other new bit manufacturers, and such as to eliminate or keep in check all would be competitors.

37. Hughes has no other true price competition than that arising from retipped bits. At this time these retipped bits move in interstate competition with all new bits, at prices far below those charged for new bits. However primarily because of the lease agreement of Hughes these retipped bits are moving in a restrained market; the retipped bits available have been numerically reduced because of Hughes enforcement of the lease agreement and because of patent infringement actions.

38. Hughes in enforcing its property rights and patent rights has systematically excluded many competitors in the field of manufacturer or repair of roller rock bits in the United States.

39. The primary purpose for which Hughes initiated and enforced its lease agreement has been to eliminate competition from repaired and retipped bits; the ultimate effect is to lock out second hand bits as a source of competition.

40. Hughes has used its leasing program to provide industrial surveillance over the roller rock bit industry for the purpose of attaining and maintaining full domination.

41. Hughes domination of the roller rock bit industry has been achieved and maintained by intensive engineering research, an aggressive patent policy coupled with widespread patent litigation, an abusive use of the "lease" agreement, an invasive sales policy, and an embracing of each opportunity for expansion and market control with such readiness as to discourage competition.

42. Although Hughes believed some of its patents were infringed when this action was brought, the real purpose of this infringement action was to further its existing monopoly by eliminating the defendant as a competitor and to help eliminate from competition others in a class similar to defendant.

JUDGE VAUGHT'S OPINION.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 4370-Civil.

HUGHES TOOL COMPANY, a corporation, *Plaintiff*,

vs.

D. B. COLE, an individual, *Defendant*.

OPINION.

VAUGHT, District Judge.

In this action the plaintiff seeks to enjoin the defendant from infringing certain patents, interfering with certain lease contracts, and from trespassing. The complaint charged the defendant in Count I with infringement of its patents Numbers 1,856,627 and 1,983,316, and by subsequent amendment, at the suggestion of the defendant, the infringement of its patent No. 2,333,746. Since the filing of the complaint, patents Numbers 1,856,627 and 1,983,316 have expired and we are concerned only with patent No. 2,333,746.

The complaint consists of three counts. The first alleges that the patent is being infringed by the defendant by procuring rotary drill bits covered by the patent, manufactured and leased by the plaintiff to oil well drillers, welding new metal on to the worn cutter shells of the bits and building new teeth thereon, and that such acts of the defendant constitute reconstruction and rebuilding of the cutters and bits. It further alleges that the bits are leased to the users thereof and are not sold, the title remaining at all times in the plaintiff. That such worn-out bits as the defendant procures and so reconstructs are sold by him without plaintiff's knowledge or consent.

The second count, in brief, alleges that plaintiff leases said bits to the users thereof under an arrangement which

is recorded on the delivery tickets and which is hereinafter set out.

The third count alleges that the defendant, with full knowledge of the provisions of the lease agreement, by wrongfully taking possession of said bits, accepting the surrender thereof from the lessees and inducing the lessees to surrender the bits to them, has participated in breaches of the lease agreement, abetted and encouraged said lessees to breach their lease, and deprived the plaintiff of its rights under said lease agreement, and prays that the defendant be permanently enjoined.

The defendant filed an answer and counterclaim. He admits many of the acts complained of by plaintiff, but denies that in so doing he in any manner infringes the plaintiff's patent. He admits that plaintiff has been engaged for a long time in manufacturing rotary drill bits and that it distributes the bits under the lease agreement, but urges that the agreement is but a subterfuge to obtain and maintain a monopoly upon the market for roller bits including secondhand bits, in violation of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended, entitled "an Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, and particularly sections 1 and 2 (15 U. S. C. A. 1-2). He further admits that his acts have been without the consent of the plaintiff but denies that he performed any retipping on bits that were "worn-out."

In answer to Count II defendant admits that each of the bits distributed by plaintiff has been marked as the property of the plaintiff, and admits knowledge of the lease agreement.

In answer to Count III defendant urges that the lease agreement is but a subterfuge to monopolize the drill bit industry in violation of the Sherman Act.

The counterclaim is voluminous and alleges in effect violation of the Sherman Act, contending that the acts of plaintiff, in the distribution of its bits and the conduct of

its business, constitute a deliberate plan to monopolize and control the roller cutter drill bit industry. Defendant further contends that the lease contract with the users of plaintiff's bits was made in furtherance of its intent to dominate, control and monopolize said industry, setting out fifteen allegations of acts upon which he bases his contentions. He further contends that his business has been damaged and prays for an injunction and for damages.

Plaintiff replied to the amended counterclaim, denying in effect all the allegations thereof, except that it admits that in the latter part of 1931 or early in 1932, it began its lease system in the distribution of its bits and in recovering all bits so leased for the purposes set forth in its pleadings.

The evidence introduced consisted of oral testimony, depositions and records of testimony in former cases, introduced by agreement of counsel, testimony given in discovery depositions, together with a large number of exhibits. The evidence has been carefully considered by the court, together with the briefs.

This case is one of a series, involving the same character of testimony, that have been tried and determined in this Court, the Court of Appeals and Federal Courts in other jurisdictions, which raised practically the same issues of both law and fact. However, in the instant case the evidence offered by the defendant, while of the same character as offered in other cases, covers the field more thoroughly and in greater detail. For that reason we deem it advisable to go into the history of the field of endeavor out of which the issues involved here have developed. The cause of action here grows out of activities in the development of the production in various oil and gas fields over the past thirty or forty years. It is common knowledge that in the various activities in a newly-discovered oil and gas field, the keenest competition develops. The lure of quickly-acquired riches attracts thousands of people. First are the investors who desire to acquire, as quickly as possible, interests in real estate in the vicinity of the discovery well. At once there

is a great influx of real estate brokers, oil and gas lease brokers and individual investors, all competing for such interests. Next the drillers of oil and gas wells appear. Those who own or acquire interests in the real estate want production as rapidly as it can be accomplished, and the great race is on to tap the sources of supply. They want the most skilled and the fastest drillers they can secure; those with the best organizations, tools and equipment. In the development of the various fields, drillers encounter various strata of earth formation, which requires drilling bits that will accomplish the desired results. Hard formations require certain types and character of bits to drill the hole rapidly. This situation has challenged the ingenuity of the inventor, the scientific learning and ability of the engineer, and the skill of the factory organization capable of manufacturing the devices known as drilling bits. The constant demand of the driller for faster drilling bits has inspired the inventor and the engineer to produce the best character of bit, and to continually observe the service it performs and improve its performance. This has resulted in the United States Patent Office being flooded with various inventions in the art. Many patents have been issued on such inventions, and a great deal of litigation has ensued for infringement, resulting in the courts declaring some of such patents invalid and sustaining others. Most of the litigation has been brought about by keen competition in the manufacture, sale, distribution and use of the bits, and claimed infringement of patents of the articles or devices covered by them. The evidence discloses that the bit which is of greatest interest to the driller is the bit used in drilling hard rock formations (hereinafter referred to as the "hard rock bit"). The keenest competition in design, material, manufacture and distribution exists in these hard rock bits. At the time this action was instituted a number of firms designed, manufactured, sold, leased and distributed a roller cutter bit under patented devices. Among them were the plaintiff, Reed Roller Bit Company, Chicago Pneumatic Tool Company, Globe Oil Tools Company, H. C. Smith Oil

Tool Company, Security Engineering Company, Inc., and esser firms, the plaintiff having the largest organization nd furnishing the greatest output of the product.

Plaintiff has for many years manufactured and distrib-ted hard rock bits, under various patents which emanated rom and were developed within its own organization hrough its research department, and were not obtained rom outside competitive individuals or organizations, mong which were patents Numbers 1,856,627, 1,983,316 and ,333,746. The validity of No. 2,333,746 has been challenged ere. These bits are designed and manufactured for the urpose of drilling hard rock formations and are known mong the users as three cone bits for rotary drilling. With-ut attempting to describe them technically, so far as the ssues here are involved, it is sufficient to say they are what termed as integral device, that is, they consist, as assem-led, of one solid or integral unit. There are two elements n the tool, the bearings that have to do with the rotary otion of the drill and the teeth that come directly in con-act with the hard formation that is drilled. Upon the life f these two elements depends the usefulness of the device. When either element is worn out the device is of no further se unless it can be repaired. The tool is designed in such manner that the two elements should be worn out at prac-cally the same time, but sometimes this does not occur. Many times the teeth are worn down to the cutter cone be-ore the bearings are worn out. It is this latter situation that as given rise to the difficulties encountered here. When the eeth of the bit are so worn that its usefulness in drilling gone, but the bearings are still in a useable condition, it possible to weld metal onto the stubs of the teeth and re-ore them to their original shape and then use the bit for rther drilling. This operation is known as retipping. This tuation has given rise to an activity upon the part of elders to procure these bits for retipping. The bits are rocured in various ways—from the lessees or their agents, icked up from where they are dumped at the drilling rigs, r arbitrarily taken from the stockpile at the rigs without

plaintiff's consent. After the bits are retipped, either a charge for the service is made to the lessee or they are sold to the trade in the field. The defendant is one of those engaged in retipping activities.

In the earlier days of oil and gas drilling activities, bits were sold outright to the driller, and some of the manufacturers continue that practice. As the fields developed and competition in the industry grew, each manufacturer of bits became more and more interested in how his bits were performing. They employed competent field men to observe the performance of their bits and competent engineers to inspect the bits that had been used in the field, in order to discover any failure of performance and to devise ways of improving the product.

In order to do that more effectively, sometime in 1932 the plaintiff put in operation a system of leasing the bits instead of selling them, in order to secure all used bits for scientific examination for the purpose of improving its product in a highly competitive endeavor. The drillers placed the used bits aside near the rig and the plaintiff's field men would inspect them, and such ones as they deemed of special interest would be sent into the factory at Houston, Texas, for scientific research by competent engineers. Out of that scientific examination and research the bits were improved from time to time—new devices invented and new patents obtained. The residue of the drilled bits subsequently would be gathered up by plaintiff and salvaged by smelting. The recovered metal was then either used or sold by the plaintiff. Considerable effort was put forth by plaintiff to gather up the used, dull bits, but its efforts were at times interfered with or retarded by the retipping activities of others.

The method of distributing the bits by the plaintiff under its lease agreement was to accompany the delivery of bits to the driller with a ticket which bore the legend:

"Hughes roller rock bits and all core bit heads are never sold but are leased. When the original cutter

teeth and/or bearing have served their useful life, the user will surrender the bits to Hughes Tool Company upon request. In accepting delivery, the user agrees not to surrender any of the tools as mentioned above to other than a duly authorized representative of the Hughes Tool Company."

It will be noted that the terms of the lease are definite and the use of the device is for an indefinite period. The lease is simple and uncomplicated. The term is for the duration of the useful life of the device, which the evidence discloses may be for as short a time as a few hours, dependent only upon the conditions encountered in the drilling formations. The use of the device, under lease, is controlled entirely by the lessee, and the price is in no way dependent upon the amount or character of work performed by the device, but the lease merely provides for the return of the residue of the device as a drilling bit, upon demand. The lease contract is open to all users of hard rock bits, and no distinction is made in the rental price to any user.

Each of the bits delivered had stamped in the bit a serial number and the legend: "Property of the Hughes Tool Company," which was easily discernible by anyone handling or observing the bit. The evidence discloses that scattered among bits distributed by the plaintiff were experimental bits which were to be used in certain character of drilling, the recovery of which was important to the plaintiff for scientific study by its engineers. There were no special identification marks on the experimental bits, and the fact that they were experimental was known only to the plaintiff.

The defendant attacks the lease agreement and method of distribution of the bits by plaintiff, contending that it is not a good-faith arrangement but has been designed and carried out as a subterfuge to monopolize and control the hard rock bit industry and violate the Sherman Anti-Trust Act.

The defendant further contends that the fact the plain-

tiff distributes by far the largest percentage of the hard rock bits used in the oil industry, of itself is sufficient to establish a monopoly in the industry, and cites many authorities in an effort to sustain that contention. After reading those authorities and analyzing the respective factual situations and attempting to apply the law stated therein to the factual situation in the instant case, in my opinion they are not in point. Our attention has been called to *United States* v. *United Shoe Machinery Corporation,* 110 F. Supp. 295. The factual situations in the two cases are easily distinguished. In the instant case, the overwhelming demand for the hard rock bits manufactured by plaintiff, as disclosed by the evidence, has been the controlling factor in the success of the bits. Every user of hard rock bits who testified expressed his preference for the bits upon their merit. There is no doubt that the position obtained by plaintiff in the competitive field must be attributed to the merit of the hard rock bits manufactured and distributed by it. In the *United Shoe Machinery Corporation* case, *supra,* in discussing the legal principle involved, the court said (p. 342):

> "Indeed the way in which Mr. Justice DOUGLAS used the terms 'monopoly power' and 'effective market control,' (*United States* v. *Griffith*) 334 U. S. 100, 107, lines 2 and 6, 68 S. Ct. 941, at page 945, and cited *Aluminum* (*United States* v. *Aluminum Co. of America*) suggests that he endorsed a third and broader approach, which originated with Judge HAND. It will be recalled that Judge HAND said that one who has acquired an overwhelming share of the market 'monopolizes' whenever he does business, 148 F. 2d at page 428, column 1, apparently even if there is no showing that his business involves any exclusionary practice. *But, it will also be recalled* that this doctrine is softened by Judge HAND'S suggestion that the defendant may escape statutory liability if it bears the burden of proving that *it owes* its monopoly solely to superior skill, superior products, natural advantages (including acces-

sibility to raw materials or markets), *economic or technological efficiency* (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law (*including patents on one's own inventions,* or franchises granted directly to the enterprise by a public authority)." (Emphasis supplied.)

Under the factual situation in the instant case, it is my opinion that the plaintiff comes clearly within the exception.

A great deal of the evidence upon the part of the defendant is directed to the proof of such contention. Considerable testimony has been introduced as to facts and circumstances surrounding the origin and purpose of that lease agreement, which has been well summed up by the witness General Kuldell as referred to when Thomas M. Mobley was testifying as follows (R. 431-434):

"Q. I want to read you two questions and answers from the testimony of General Kuldell which was taken in the *Chicago Pneumatic Tool* case and is now a part of this record. * * * 'Q. I know it was many years ago, but do you recall the time when the sales organization or the field service organization changed? That was during the time you were there, I think. A. Yes, that's right. Q. Do you recall the reasons for changing or expanding the field organization and leasing rather than selling? A. It became a buyer's market instead of a sellers' market and we couldn't sell the standardized bit which we had been making and selling through supply stores. The field test then became more of an engineer's instead of a sales test to analyze the driller's problem and try to furnish him the most effective tool for his problem. And the whole business the whole character of business, changed from one of standardized manufacture to one of seeking to manufacture not the most but at least the limited types of bits that would meet the limited field conditions. And to do that we sent many more men and men with much better tech-

nical training into the field and they delivered the bits to the rig and watched them and got the results and reported back. Mostly sending the worn bits back to the laboratory for analysis. And that's how we came on this steel. The bearings wouldn't hold up; so better and better and better steels were developed until they held up better, and the teeth were changed and the spacing was arranged differently. All that information came from the field organization which were now the technical men who took the trouble to go to the rig and deliver the bits and watch them and bring them back. So the bits were no longer sold as a standardized product. They were what we call now a tailor-made product, made for the formation in the field.' Do you agree with that testimony? A. Well, most of the information that I had concerning those times came from the Colonel, and he is the man that knew."

This lease agreement under which plaintiff distributed its bits, which has been in force since 1932 *long before any retipping was practiced or even contemplated,* has been under attack in many cases and has been held valid. *Robertson Rock Bit Company, Inc., et al.,* v. *Hughes Tool Company,* 176 F. 2d 783, 785 (5 Cir.):

> "As to the leasing agreements and the practices of recovering used bits under them, the district court properly held them valid."

In *Williams* v. *Hughes Tool Company,* 186 F. 2d 279, 281 (10 Cir.) certiorari denied, 341 U. S. 903, in holding the lease agreement valid, the court said:

> "Moreover, the decision of the Fifth Circuit in *Robertson Rock Bit Co.* v. *Hughes Tool Co., supra,* was rendered upon facts substantially identical with those presented on this record, and that decision, while not binding on this court, is strongly persuasive under the doctrine of comity."

And again in *Williams* v. *Hughes Tool Company,* 199 F.

2d 862, 864 (10 Cir.), the lease agreement is held to be valid. *In fact this court is of the opinion that every question raised in the case at bar and in the case above cited has been determined by the latter opinion and is decisive here.* Quoting from Judge MURRAH who concurred specially:

"In the former case, it was my view that the unexpired patents were valid but uninfringed; that separate and apart from the patent monopoly, the leasing agreement had the legal effect of prohibiting retipping of the Hughes bits. The question remained, in my mind, whether the agreement, when considered outside the patent monopoly and construed to prevent retipping, could be squared with the anti-trust laws. Being of the view that this question was open and undecided in the trial court, I thought the case should be remanded for the determination of that issue in the first instance.

"I interpreted the majority opinion in the former case to sustain the validity of the leasing agreement as a condition upon the right of use of the patented bits. Thus construed, it was my view that the injunction was limited to the protection of the patent monopoly. *Now, however, my brethern construe the opinion to sustain the validity of the leasing agreement as a proper exercise of Hughes' property rights in its bits apart from the patent monopoly. The plain implication of this holding is to remove any question of the validity of the leasing agreement under the anti-trust laws, and it forecloses the question which I had thought was at large in the lawsuit.* I must accede to the majority's interpretation of what it has written." (Emphasis supplied.)

This court having tried the *Williams* case, *supra,* in the first instance and being thoroughly acquainted with the evidence there submitted, which evidence has been introduced by stipulation in this cause, and having carefully considered all of the evidence introduced in the instant case, sees nothing new in the evidence here, in so far as infringement of

the patents is concerned or as to the validity of the leasing agreement, from that of *Williams* v. *Hughes Tool Company, supra* (186 F. 2d 278). There it was held there was an infringement of patents Numbers 1,856,627 and 1,983,316 which, as stated above, have expired since the filing of the case at bar, and leaving here patent No. 2,333,746, only.

Without going into tedious detail suffice it to say that in view of the above holdings, the court is of the opinion that patent No. 2,333,746 is a valid patent and is being infringed by the defendant. However, the validity or invalidity of this patent is immaterial in determining the real issue in this case.

The defendant contends that he is engaged in a competitive activity in hard rock bits which he describes as secondhand bits, and that the plaintiff, in the manner of conducting its business in the manufacture and distribution of its hard rock bits, is unfair and tends to monopolize the competitive hard rock bit industry in violation of the Sherman Act.

Some of the companies which manufactured and distributed competitive bits of a similar character, sold their bits outright, parting with all title in them, and paid no attention to them thereafter. In such a situation, so long as any repairs or attempted repairs on such bits did not amount to reconstruction in such a manner as to infringe the patent on the article, the company could not complain. The evidence discloses that Reed Roller Bit Company and some others thus paid very little, if any, attention to what is known as retipping. The retipping was done by welders.

The plaintiff has no complaint against the retipping of bits of other manufacturers. It objects to the retipping of the Hughes bits because *they are the property of plaintiff*. It does not even appeal to reason to say that defendant can secure, often by questionable means, the property of plaintiff for retipping purposes and contend that it can use plaintiff's property *in competition* with plaintiff, and by so doing engage in a *legitimate competitive activity*.

That leaves two questions yet to be determined. First, do the lease agreement and the acts and conduct of the plaintiff in the distribution of its bits violate the Sherman Anti-Trust Act, by creating a monopoly in the sale and distribution of the bits, as alleged in the answer and counterclaim of the defendant? It is the opinion of the court that they do not. Such a contention has been foreclosed by the opinions in *Williams* v. *Hughes Tool Company, supra* (186 F. 2d 278 and 199 F. 2d 862). In the earlier case it was contended that there was a misuse of the patents which violated the Clayton Act (15 U. S. C. A. 12, *et seq.*). In that case the court held:

> "We conclude that Hughes is not guilty of a misuse of its patents and has not violated the Clayton Act, 15 U. S. C. A., Sec. 12, *et seq.* * * *"

In the *Williams* case, 199 F. 2d 862, quoting again from the concurring opinions:

> "Now, however, my brethern construe the opinion to sustain the validity of the leasing agreement as a proper exercise of Hughes' property rights in its bits apart from the patent monopoly. The plain implication of this holding is to remove any question of the validity of the leasing agreement under the anti-trust laws, and it forecloses the question which I had thought was at large in the lawsuit. I must accede to the majority's interpretation of what it has written."

With this holding this court is not only in accord but feels that it is binding here.

The second question is: Apart from the patent monopoly, has the plaintiff the right to control by lease agreement the distribution of its bits for the purposes established by the proof? This question too has been determined adversely to the contentions of the defendant. In the *Williams* case, *supra* (186 F. 2d 278, 285) the court said:

> "The reasons which motivated Hughes in leasing, rather than selling its bits, and in requiring the return

thereof for inspection, testing and research are obviously to enable Hughes to improve the quality of its bits, to provide the proper bit for drilling in particular formations or in a particular area, to provide valuable information to drillers who use the Hughes bits, to maintain the high standard of its products and protect their reputation. Failures of retipped bits would tend to injure the reputation of Hughes' bits. The lease agreement and the practice of recovering used bits, as stated by the Fifth Circuit in *Robertson Rock Bit Co.* v. *Hughes Tool Co., supra,* is practical, reasonable and fair."

And again in the *Williams* case at 199 F. 2d 862, 863, the court said:

"Williams presents only one specification of points for reversal of the challenged order. Its substance is that since the patents have expired there is no justification for continuing the injunctions restraining Williams from interfering with the property rights of Hughes in its leased bit by retipping or rebuilding the teeth thereon. * * * It is admitted frankly in the brief of Williams that if these two features of the injunction had been completely separate and independent holdings, the expiration of the patents would not affect the feature relating to interference with the property rights of Hughes in its leased bits by retipping and rebuilding teeth thereon. *But the two features of the injunction were separate and independent.* The equitable right of Hughes to protection against infringement of its patents was quite separate and apart from its system of leasing its bits rather than selling them. Hughes was entitled to restrain infringement of its patents whether the bits had been leased or sold. And if the practice of Williams in receiving from lessees bits manufactured by Hughes, retipping them, and building new teeth thereon, constituted systematic encouragement to lessees to breach valid and effective provisions

in the leasing agreements, Hughes was entitled in equity to restrain such wrongful conduct without regard to whether the bits were manufactured under patents or not. *The two rights were separate and distinct.* Neither was dependent upon the other. Neither was an adjunct of the other. * * *" (Emphasis supplied.)

This reasoning is not only sound and logical, but is binding upon this court. The manufactured article, regardless of any patents, belonged to the plaintiff. In its method of distribution it could either lease or sell. It chose to lease its bits and recover them when their life of usefulness was over. Aside from the skill in the tool, it contained valuable material. The evidence discloses that aside from any patentable feature, when the bit was returned and put through the smelter, it had substantial value; that there was as much as $200,000 salvage value in one lot. But the defendant contends that the plaintiff permitted some of its customers at times to do the very thing he was doing to the bits. We fail to see any relevancy in the testimony. This defendant was not a party to the lease agreement in any respect. He was an independent operator, doing what he did at his own risk. He has no complaint of merit about how the plaintiff carried out its lease contracts with its customers. Such conduct was no concern of his. Everytime he handled one of these bits he had staring him in the face the legend thereon that it was the property of the Hughes Tool Company. The slightest inquiry would have disclosed the terms of the lease and he would have been informed that in accepting the delivery of the bits the lessee agreed "not to surrender any of the tools mentioned to other than a duly authorized representative of the Hughes Tool Company."

The defendant admits practically all of the acts alleged by the plaintiff and what he has not admitted have been amply substantiated by the evidence. It is the opinion of the court that the defendant is infringing the plaintiff's patent No. 2,333,746 and should be enjoined from so doing.

The plaintiff is entitled to an injunction against the defendant enjoining him from in any manner interfering with the leased property of the plaintiff.

Findings of fact, conclusions of law and a proper form of judgment in compliance with the view herein expressed may be submitted within thirty days from this date.

/s/ EDGAR S. VAUGHT,
United States District Judge.

Dated this 1st day of July, 1953.

Endorsed: Filed July 1, 1953. Theodore M. Filson, Clerk.

In the United States District Court for the Western District of Oklahoma.

Hughes Tool Company, a corporation, Plaintiff, vs. B. F. Conaghan, an individual, Defendant.—No. 4374-Civil.

OPINION.

VAUGHT, District Judge.

The above entitled cause and number 4370-Civil—Hughes Tool Company, a corporation v. D. B. Cole, an individual, were consolidated for trial and the same evidence which was the basis for the opinion in the Cole case will be treated as the basis for the opinion in the instant case. Therefore, the opinion rendered in the Cole case is adopted and made the opinion in this case.

A proper form of judgment may be submitted within thirty days from this date.

/s/ EDGAR S. VAUGHT,
United States District Judge.

Dated this 1st day of July, 1953.

Endorsed: Filed July 1, 1953. Theodore M. Filson, Clerk.

OPINION OF COURT OF APPEALS, TENTH CIRCUIT.

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

Nos. 4785, 4786, 4787 - September Term, 1954.

D. B. COLE, APPELLANT,

vs.

HUGHES TOOL COMPANY, a Corporation, APPELLEE.

B. F. CONAGHAN, APPELLANT,

vs.

HUGHES TOOL COMPANY, a Corporation, APPELLEE.

HUGHES TOOL COMPANY, a Corporation, APPELLANT,

vs.

R. W. FORD, APPELLEE.

Appeals from the United States District Courts for the Eastern and Western Districts of Oklahoma.

[OPINION.]

Filed. United States Court of Appeals, Tenth Circuit. Sep. 15, 1954. Robert B. Cartwright, Clerk.

Robert F. Davis and Charles M. McKnight for appellants in Nos. 4785 and 4786 and for appellee in No. 4787.

Edward A. Haight (George I. Haight, Robert F. Campbell, Ray L. Smith and Lynn Adams were with him on the briefs) for appellee in Nos. 4785 and 4786 and for appellant in No. 4787.

Before Phillips, Chief Judge, and Bratton, Huxman, Murrah and Pickett, Circuit Judges.

PHILLIPS, Chief Judge.

These are appeals from judgments in three cases, of identical nature, commenced by the Hughes Tool Company.[1]

1. Hereinafter called Hughes.

One case, brought against Ford, was commenced in the Eastern District of Oklahoma. The other two cases, brought against Cole and Conaghan, respectively, were commenced in the Western District of Oklahoma. Each defendant is engaged in reconstructing or rebuilding rotary drilling bits used for drilling oil and gas wells manufactured by Hughes and leased by it to drillers. Such reconstructing or rebuilding is commonly called and will hereinafter be referred to as retipping.

Each complaint contained three counts: (1) for patent infringement, (2) for conversion of Hughes bits, and (3) for interference with Hughes' property and contract rights. The defendant in each case filed a counterclaim charging violations of Sections 1 and 2 of the Sherman Act[2] and sought damages under Section 4 of the Clayton Act.[3] For convenience, the three cases were consolidated for trial, but not for decision. The trial judges sat together. Chief Judge EDGAR S. VAUGHT decided the *Cole* and *Conaghan* cases and Judge WILLIAM ROBERT WALLACE decided the *Ford* case.

The patents in suit are Fletcher No. 1,856,627; Scott and Garfield No. 1,983,316, and Scott, *et al.*, No. 2,333,746.

In the *Cole* and *Conaghan* cases, each of the three patents in suit was adjudged to be valid and infringed and the respective defendants were adjudged to have converted Hughes' bits and to have interfered with Hughes' property and contract rights and the defendants were enjoined from infringing Claims 1 and 4 of Patent No. 2,333,746 and from interfering with Hughes' rights in its leased bits, and the counterclaims were dismissed. The other two patents had expired during the pendency of the suits.

In the *Ford* case, Patents Nos. 1,856,627 and 1,983,316 were adjudged to be valid and infringed and Patent No. 2,333,746 was adjudged to be invalid for want of invention.

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2. 15 U. S. C. A., Secs. 1, 2.

3. 15 U. S. C. A., Sec. 15.

In the *Ford* case, the court further found that the defendant had converted Hughes' bits and interfered with Hughes' property and contract rights, but denied relief on the ground that Hughes had violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.

On the counterclaim in the *Ford* case, the court adjudged that Hughes had violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, enjoined further violations of such Acts by Hughes, and ordered an accounting.

In rotary drilling, the bit is the key piece of equipment and the remainder of the drilling rig is designed to serve the bit. Such additional equipment must provide weight, and provide for removing the cuttings, changing the bit, and rotating it. Such additional equipment includes: A drill stem to which the bit is attached; a kelly joint and swivel used in rotating the bit; blocks, derrick and draw works to raise and lower the bit; mud pumps to circulate the flushing fluid; and a source of power. The cost of a large drilling rig for deep drilling is approximately $500,000. To operate the rig there are ordinarily three crews of five men each, each crew working eight hours a day, together with a tool pusher in charge of the rig. The cost of drilling varies from approximately $450 a day with a light rig in shallow formations to $1,500 per day with a large rig in deep formations. The requirements of a rock bit for rotary drilling are great and its structural design is subject to severe limitations. Obviously, a bit can be of no larger diameter than the hole which it drills. The limited space available must be so allotted as to secure the most desirable relationship among all the elements that are essential in an effective rotary drilling bit. Balance must be achieved between tooth depth, shell dimensions and bearings. Drilling conditions vary widely. Formations vary in hardness, tilt, and abrasiveness. It has been found desirable to provide bits that will obtain maximum performance in each of the varying depths, formations, and other drilling conditions. The cost of operating

a rig may run as much as $40 to $50 per hour. Hence, it is of great importance that a bit drill as rapidly as possible. It is important that the bit minimize fatigue on the drill stem and have adequate clearance, so that it may be lowered into the well and raised out of the well. The bit must maintain a full-gauge hole. Some formations are sticky and tend to adhere to the cutters. The bit must be designed to shed formation cuttings and permit facility of cleaning by the flushing fluid. Of paramount importance is the number of feet that a single bit will drill in a given formation. At depths of 10,000 feet it will take approximately eight hours to change the bit. At such depths, the cost of changing a bit may be several times the cost of the bit itself. From the foregoing it will be apparent that the designing of an efficient rotary drilling bit is both difficult and exacting.

In the years 1929 and 1930, Hughes manufactured what was known as its "Simplex" bit, which had removable cones. It made and sold two types of cones for that bit. During those years, its cones were sold to supply stores, which supplied oil companies and drilling contractors with the cones.

As early as 1931, Hughes had established a research department with a central research laboratory at Houston, Texas, with a laboratory staff and field personnel. Its research department had two primary objectives—to reduce the number of bits required to complete the drilling of a well and to increase the drilling rate of its bits, thereby reducing the drilling costs.

In 1931, there was an unusually large amount of rotary drilling of oil and gas wells in East Texas. A large part of the Hughes research field personnel was concentrated in that area, and Hughes began a very extensive observation of the performance of its bits in the field and made further examinations, tests and analyses of its bits in its central research laboratory. It was then that Hughes adopted the practice theretofore used by other bit manufacturers, of leasing, instead of selling, its bits. Under the leasing ar-

ngement, the bits, when they had served their useful life, re returned to Hughes for field examinations and for exinations, tests and analyses in its research laboratory. mparisons were also made of the performance of differt bits and of the performance of particular bits in parular formations and under particular drilling conditions. ith the expansion of its field organization, the business Hughes, between 1932 and 1934, was changed from that manufacturing and selling to supply stores two types of ical cutters for its Simplex bits, to a bit service, which braced many types of bits, each type being particularly apted to a specific formation or drilling condition, and, rsuant to which, bits were delivered, under an informal se, to oil companies and drilling contractors at the derk floor, which were of the size and type best suited to formations and conditions in which they were drilling. was in 1934 that Hughes adopted a formal leasing conct, which contained the following provision: "When the ginal cutter teeth and/or bearings have served their eful life, the user will surrender the bits to Hughes Tool mpany upon request. In accepting delivery, the user rees not to surrender any of the tools as mentioned above ther than a duly authorized representative" of Hughes. ch bit is stamped with the words, "Property of Hughes l Co."

Hughes maintains, at its central research laboratory, rsonnel and equipment to test bits, make metallurgical estigations and chemical analyses, compare performance different bits, and carry on other like research. It mains a field organization of approximately 175 men. These n deliver new bits to the drilling rigs of the users and k up the wornout bits. It also maintains a staff of field gineers, stationed at division points, who examine used s and check their performance. Beginning in 1931, and tinuing to the present time, each bit produced by Hughes l been marked with an identifying serial number. ghes' field men follow the life of each bit from the time

it is received by the driller until the time it has served its useful life. They maintain records in which the bit is identified by its serial number and which set forth the footage drilled, hours run, weight carried, speed of rotation, quantity of fluid circulated, and formations drilled. They make certain that the right type of bit is delivered for the particular drilling conditions existing at each drilling rig. A field man examines the bits picked up, and, if he thinks further examination is desirable, sends them to field division points, or to the central research laboratory at Houston, Texas, accompanied by information with respect to each bit as to the conditions of use, formations drilled, and its performance. The information gathered by Hughes' field organization, as to the performance of its bits in particular formations and areas, under specific conditions, is made available to users of Hughes bits and is of substantial value to them.

Such research has enabled Hughes not only to eliminate flaws appearing in its bits, but to constantly improve the design and operating qualities of its bits, and to extend the useful life thereof.

Illustrative of the meticulous care with which Hughes undertakes to discover and correct even minor defects in its bits was its action with respect to reported failures at the spear point on the number one cone of a specific size and type of Hughes bit. Moore, a field engineer, who had learned of two such failures, was asked to investigate. He examined 260 dull bits of the specific size and type in which the failures had been reported. Each of the bits apparently had made a satisfactory run, but, in a few instances, had manifested potential weakness. The central research laboratory made suggestions for correcting the defect by shortening the pilot pin on the cone and changing the carburization. By changing the design and the heat treatment of a small portion of one specific cone, the discovered defect was corrected. Many like examples are reflected by the record in these cases.

There can be no eyewitness to the vicissitudes and ac-

complishments of the rotary drilling bit operating under the earth's surface, at times to a depth of as much as three miles. Operating conditions and performance can be and are carefully noted, but they do not tell the whole story. It is only through examinations of the bits in the field, at field division points, and in the research laboratory, in the light of the record of each particular bit, that the manufacturer can eliminate flaws, design improvements in the drilling qualities and the increase life of the bits. These have been accomplished by Hughes in a very large measure through its research department. As a result, Hughes enjoys the reputation of producing the best rotary drilling bit on the market.

At the present time, Hughes manufactures approximately 475 different sizes and types of bit, in order to accommodate the requirements of the industry in different size holes and in different formations. Availability of used bits to compare performance of similar types and sizes, different sizes of the same type, and different sizes and types in different formations is essential to the carrying on of Hughes' research program and the improving of its bits. In one year, Hughes leased 18,000 experimental bits. Return of these bits and also of the standard bits run under similar conditions was essential to Hughes' research and development program. A dull standard bit is the yardstick by which Hughes measures the relative merits of its experimental bits.

It was only through the recovery of the Hughes bits at the end of their useful life, and examinations, tests, and analyses in its research department, that Hughes has been able to accomplish its phenomenal success in the designing and manufacture of rotary drilling bits.

Hughes has manufactured through the years, and is today manufacturing and supplying to the industry, the best rotary drilling bits made by any manufacturer. This is established, not only by Hughes' witnesses, but by witnesses for the defendants. The first witness called by the

defendants, who was engaged in the drilling of oil and gas wells, testified that between 80 and 85 per cent of the bits used by him were Hughes bits, and that while he could use bits of other manufacturers, he used the Hughes bit because "it was the best bit that was built in the world, in my opinion."

The practice of retipping rotary drilling bits commenced in a small way in 1936. Conaghan began retipping bits in 1937 or 1938, but discontinued after a short time, and began to retip again in 1944. Ford began retipping bits in July, 1944, and was so engaged until 1950. Cole has been retipping since April, 1946. There was no extensive use of retipped bits until 1937. The practice of retipping bits began long after Hughes adopted its informal leasing practice and its formal leasing contract in 1934.

Ordinarily, when the teeth of a bit have become so worn from use that the original cutter teeth have served their useful life, the bearings are practically worn out, and the useful life of the bit is at an end. Generally, a bit once placed in a hole is not withdrawn until its useful life has ended. However, in a limited number of the bits the bearings survive the life of the original teeth and the restoring of the original teeth by retipping makes possible the further use of such bits in the drilling of soft formations. Only a small percentage, perhaps 12 to 15 per cent, of bits are susceptible to the retipping process.

Each of the defendants has been engaged in the same type of operation. Each has acquired dull bits leased by Hughes, either from a drilling contractor or by purchase from a "roughneck" or from a person acquiring and selling stolen bits. Each defendant has reconstructed the teeth on the bits and then sold the retipped bits, either to the person from whom the dull bit was acquired, or, in many instances, to someone else. The retipping process was described by this court in *Williams* v. *Hughes Tool Co.*, 186 F. 2d 278, 282, as follows:

"Williams is engaged in the business of retipping

bits on which the original teeth are worn out, and returning the bits to the lessees thereof for further use. Williams first washes the bits. With an acetylene torch and tungsten tube metal, he then restores each worn tooth as nearly as possible to its original form, size and position. He keeps the bit and those teeth on which he is not working during the retipping process submerged in water to prevent loss of temper. Williams retips bits which have been worn through use to an extent that the original teeth have served their useful life."

The defendants' retipping differs from that described by this court in only one material respect. Williams restored the teeth to their original form, size and position. In some instances in the instant cases, the defendants took dull Hughes bits which never embodied the improvement embraced in the Scott, *et al.*, patent, No. 2,333,746, and modified the tooth structure to conform to Hughes bits embodying the device of that patent. The device of that patent is particularly designed to drill in the softer formations, the kind of formations in which retipped bits are ordinarily used.

The evidence disclosed that many of the bits purchased or received by the defendants for retipping had been stolen and that the defendants accepted any bits that came to them, knowing that traffic was being carried on in stolen bits, and without any concern as to whether the rights of Hughes were being invaded.

Two of the six Hughes bits found in the possession of Ford contained experimental features. The two bits had been leased in the regular course of business, without disclosing the fact that they embodied experimental features, to insure the use of the bit under normal conditions. The retipping of the bits prevented the examination in the research department of Hughes of the experimental dull bits after their normal run.

I.

THE COUNTERCLAIMS.

In his opinion in the *Ford* case, Judge WALLACE stated that the object of the leasing practice of Hughes was to enable it "to make certain that the majority" of its bits would not be repaired and used again in competition with its new bits and "that the paramount aim" of the leasing practice "was to promote sales rather than to achieve engineering perfection." Those statements were completely refuted by competent and credible witnesss who had full knowledge of the facts with respect to the reason for the adoption by Hughes of its leasing practice.

We disregard, and Judge WALLACE should have disregarded, the testimony of defendants' witness, Mobley, primarily for the reason that it was clearly pure hearsay and also because substantially all of the material portions of such testimony constituted disclosures of confidential information which came to him in his capacity as attorney for Hughes and was inadmissible under the rule which precludes disclosure of privileged communications between attorney and client. Mobley was an associate of the law firm of Andrews, Kelley, Kurth & Campbell from October 3, 1931, until September 1, 1939. During that period such firm was legal counsel for Hughes. As a member of the firm assigned to serve Hughes, Mobley had access to Hughes' files and familiarized himself therewith. His actions and communications during that time were in his capacity as lawyer for Hughes. What he did in his connection with the leasing agreement was in his capacity as such lawyer. In a deposition taken in Chicago, in *Chicago Pneumatic Tool Co.* v. *Hughes Tool Co.*, 10 Cir., 97 F. 2d 945, and introduced in the instant case, Mobley testified that he knew nothing of his own knowledge with respect to the reasons for the adoption of the leasing agreement by Hughes, and that all he knew with respect thereto was hearsay. He reiterated that testimony in the instant cases.

Responsible administrative employees of Hughes at the

time the leasing practice was inaugurated and at the time the formal leasing contract was adopted, who had full knowledge of the facts, testified that the purpose of the leasing practice was to enable Hughes to repossess wornout bits for field inspection and examination, for laboratory tests and analyses, for comparison of their performance with other bits, including experimental bits, for the discovery and correction of defects in its bits, and to improve the quality, efficiency and drilling life of its bits. That testimony is fully corroborated by facts and circumstances established by uncontroverted evidence in the record. Those facts and circumstances are these: The leasing practice was adopted and put into operation by Hughes long before the beginning of the retipping of bits. It delivers to the driller the size and type of bit best suited for the formation in which it is to be used. Hughes keeps a record of performance of every bit which it leases. It repossesses the wornout leased bits and subjects them to field inspection and examination by its engineers, and, in a great many instances, to laboratory tests and analyses. It compares the performance of different bits in different formations and under different drilling conditions, including the performance of experimental bits. That repossession of wornout bits is essential and necessary to the carrying out of Hughes' research program was clearly established by the evidence, both of Hughes' witnesses and other disinterested witnesses. The majority of Hughes' used bits are not susceptible of retipping. In only a small percentage of such bits is the additional life of the bearings sufficient to justify retipping. The following facts and examples show the comparatively minor part that retipped bits play in the drilling industry. Throughout the United States in 1950, in 1951, and the first half of 1952, Magnolia Petroleum Company ran 16,996 bits, of which 13,573 were new Hughes bits and none were retipped bits. Magnolia had theretofore used retipped bits, but had discontinued their use. In the same period, Phillips Petroleum Company ran 12,880 bits, of which 10,917 were new Hughes bits, and only 224 were re-

tipped bits. Since 1948, the use of retipped bits by Phillips Petroleum Company has materially decreased. In the first nine months of 1952, in Oklahoma and Kansas, Phillips Petroleum Company ran 586 bits, of which 484 were new Hughes bits and only three were retipped bits. In the first seven months of 1952, in Oklahoma and Kansas, Loffland Brothers[4] ran 482 new bits, of which 362 were Hughes bits and none were retipped bits. In the first nine months of 1952, in the same area, Noble[4] ran 1,994 bits, of which 1,736 were new Hughes bits and only five were retipped bits. In 1950, 1951, and the first half of 1952, Loffland, in the entire United States, ran 33,906 bits, of which 27,124 were new Hughes bits and only 143 were retipped bits. In the same period and area, Noble ran 26,617 bits, of which 23,186 were new Hughes bits and only 53 were retipped bits. The foregoing show that Hughes is concerned, not with competition of retipped bits, but with interference with its research program by bits falling into the hands of retippers and not being delivered to it for research purposes.

The fact that Hughes has proceeded against retippers in Oklahoma, Texas and adjoining states, and not in the area east of the Mississippi River and north of the Gulf Coast States, does not militate against the conclusion we have reached. In 1950, 24,157 new Hughes bits, 5 per cent of its production, were used in such area. In the same year, in the States of Texas, Oklahoma, and in adjoining states, where Hughes has undertaken to prevent retipping, 361,707 new Hughes bits were used. That constituted 83-1/2 per cent of its total production. It is only natural that Hughes should concentrate its efforts to prevent unlawful retipping in areas where there was the greatest interference from retipping with its research program. The fact that Hughes has not proceeded against retippers in the area east of the Mississippi River and north of the Gulf Coast States, where a large amount of retipping is practiced, but where only a

4. Loffland Brothers and Noble are the two largest independent drilling contractors.

small proportion of Hughes' output of bits is used, and, therefore, where retipping results in comparatively insignificant interference with its research program, and has undertaken to prevent retipping in areas where the major portion of its bits is used and retipping will greatly interfere with its research program, demonstrates that the purpose of Hughes' leasing agreement and its enforcement thereof is not the elimination of competition by retipped bits, but to insure the availability of Hughes bits for research and development purposes and to protect its research program.

No doubt the leasing practice has indirectly increased the use of Hughes bits, but that is because it has enabled Hughes to furnish the drillers with the best available bits for use in particular formations and under particular drilling conditions, and to greatly improve the quality, efficiency and drilling life of its bits, and to produce, as it has, the best rotary drilling bits manufactured.

It is fairly inferable from the record that there has been no objection or resistance to Hughes' leasing practice or the form of the lease agreement by producing oil companies or drilling contractors. It would be only natural for them to freely accept Hughes' leasing practice, which is essential to Hughes' research program and which has resulted in great benefits to the drilling industry.

In *United States* v. *United Shoe Machinery Corp.*, D. C. Mass., 110 F. Supp. 295, which involved leases of shoe machinery, the court did not condemn leasing as a practice or the requirement that the leased device be returned to the lessor at the termination of the lease period. What it did condemn was the length of the lease term and certain restrictive provisions in the lease involved in that case. There the lessees were required to accept leases for 10-year terms. The lease contained a provision that the lessee would use the leased machinery "to its full capacity upon all * * * footwear * * * made by or for the lessee in the manufacture * * * of which such machinery is capable of being used

* * *." It required the lessee to obtain from the lessor, exclusively, all duplicate parts, extras, mechanisms, and devices of every kind needed or used in operating, repairing, or renewing the leased machinery. As a matter of practice, the lessor assumed the burden of keeping the leased machinery in good order, making no separate charge for such service, but charging only for the parts required. The lease contained provisions for deferred payments which adversely affected the lessees who used competitors' machines. Such payments were greater when the lessees used competing machines. The lease also provided for an amortization plan, called a "right of deduction fund," under which lessees received amortization benefits, which made it advantageous for the lessees to use exclusively the machines of the lessor, and if a lessee used machines of competitors, his rights under the deduction fund were substantially decreased. The court held that the long lease term made the lessee "reluctant to experiment with a competitive machine to the extent he would wish" and deprived competitors of a chance to have their machines adequately tried out by shoe manufacturers, and that under the terms of the lease if a manufacturer preferred a competitor's machine to the lessor's on hand "he may not know the exact rate at which future payments may be commuted" and that such provisions with respect to payment were not made solely for revenue, but were also for protection against competition, and were discriminatory as to a lessee who installs a competitor's machine; that the use by a lessee of machines of competitors had a substantially adverse effect on his rights under the deduction fund; and that the practice of the lessor of rendering repair service only on its own machines and without separate charge had brought about a situation in which there were almost no large-scale independent repair companies, which situation had created a serious stumbling block to foreign manufacturers who had sought to compete with the lessor. In its decree, the court did not enjoin the use of leases. It required that the maximum term of the leases should be five years; that provisions should be

made giving the lessee the right to return the leased machinery at any time after one year; that provision for deferred payments, under which lessees who installed competitive machinery were discriminated against, should be eliminated; that the provision for a deduction fund should be eliminated; and that the lessor should not provide any service for the leased machines, except upon the basis of separate and reasonable charges for the services rendered.

In the instant case, Hughes' lease in nowise interferes with the right of the lessees to use bits of competitors and they do use such bits. It contains no provision which makes it disadvantageous for the lessees to use bits of competitors. The reason the lessees use more Hughes bits is that Hughes offers to the industry a better bit than any other manufacturer.

The decree in the *United Shoe* case did provide that after a designated time the lessor, if it offered any type of its machines for lease, should also offer such type for sale. But, it should be observed that the court in that case found that a shoe manufacturer "may psychologically or economically be more impeded by a leasing than by a selling system"; that the objectionable features of the leasing system involved in that case have had such "a special deterrent effect," and that the court was there confronted with correcting a condition that had resulted from a leasing system designed to prevent, and which had prevented, competition. No such condition exists here. The Hughes lease has not deterred nor tended to deter a driller from acquiring and using bits made by Hughes' competitors.

Of the many improvements in roller rock bits developed by Hughes' engineers, some have been found to be patentable. In some such instances, Hughes has patented its improvements and thus acquired a right for 17 years to exclude others from practicing the inventions in return for the disclosure of the inventions for the free use of the public after the end of such period. Since January 1, 1935, 38 patents pertaining to roller cutter bit structures have been

issued to Hughes. Each of the patentees was an employee of Hughes at the time each of the applications for such patents were filed. In the same period there were granted 282 patents on similar types of bits to competitors of Hughes and to others. Of the total number of 320 patents on roller cutter type bits issued since 1935, 48 were issued to Hughes' competitor, Reed Roller Bit Company; 58 to Hughes' competitor, Chicago Pneumatic Tool Company; 37 to Zublin, and 32 to Globe Manufacturing Company. The 107 remaining patents issued in the same period were granted to others, some of whom may also be competitors of Hughes. It clearly appears from the record that the inventions which have contributed most materially to the improvement of rotary drilling bits are to be found in the patents issued to Hughes, which comprise approximately 12 per cent of all of such patents issued in the period. A number of such patents have now expired and their disclosures are free for use by Hughes' competitors. Hughes utilized its inventions to improve its bits and made them available to the industry, in many instances, before the patent was granted. Its policy in that respect is illustrated by its development and placing on the market of the improvement disclosed by Patent No. 2,333,746. The first field tests of the bit embraced in that patent were made in January, 1940, by one of Hughes' engineers, stationed at Midland, Texas. By May, 1940, newly designed factory produced bits had been manufactured, run, inspected, and some of them returned to the research laboratory for further detailed examination. About a year and one-half after the first testing of the bit and even prior to issuance of the patent, the bits were already in wide use and largely responsible for an annual saving in drilling costs in the Texas Midland district of about 24 per cent.

"The mere accumulation of patents, no matter how many, is not in and of itself illegal."[5] Of course, there must

5. Automatic Radio Co. v. Hazeltine, 339 U. S. 827, 834.

not be a misuse of the patent monopoly. Here, there was no such misuse by Hughes.

In *Williams* v. *Hughes Tool Co.*, 10 Cir., 186 F. 2d 278, cer. den. 341 U. S. 903, rehearing den. 341 U. S. 934, second petition for rehearing den. 341 U. S. 956, we held that Patents No. 1,856,627 and No. 1,983,316 were valid and were infringed by the defendant therein by retipping Hughes bits; that the reasons which motivated Hughes in leasing, rather than selling, its bits and in requiring the return thereof for inspection, testing and research were to improve the quality of its bits, to provide the proper bit for drilling in particular formations or in a particular area, to provide valuable information for drillers who use Hughes bits, and to maintain the high standard of Hughes products and to protect their reputation; and that the leasing contract was practical, reasonable and fair. We further held that the provisions of the leasing agreement did not bring Hughes within the provisions of the "Tie-in" cases and that Hughes was not guilty of a misuse of its patents and had not violated the Clayton Act. In *Robertson Rock Bit Co., Inc.*, v. *Hughes Tool Co.*, 176 F. 2d 783, cer. den. 338 U. S. 948, rehearing den. 340 U. S. 923, second petition for rehearing den. 340 U. S. 939, the Fifth Circuit sustained the validity of the following Hughes patents: Fletcher Patent No. 1,856,627; Scott and Garfield Patent No. 1,983,316; F. L. Scott Patent No. 2,011,084, and the Garfield and Scott Patent No. 2,030,442, and held that the leasing agreement employed by Hughes did not constitute a misuse of such patents. In *Williams Iron Works Co.* v. *Hughes Tool Co.*, 10 Cir., 109 F. 2d 500, this court sustained the validity of the following Hughes patents: Scott Patent No. 1,480,014; Scott and Wellensiek Patent No. 1,647,753; Fletcher Patent No. 1,856,627 and Scott Patent No. 2,011,084.[6] In *Chicago Pneumatic Tool Co.* v. *Hughes Tool Co.*, 10 Cir., 97 F. 2d 945, this court sustained the validity of Hughes' Scott and Wellensiek Patent No. 1,647,753. In *Williams* v. *Hughes Tool*

6. Claim 6 of such patent was held valid and Claims 7 and 8 invalid.

Co., 10 Cir., 199 F. 2d 862, this court held, in effect, that Hughes' system of leasing bits did not constitute an unlawful exercise of Hughes' property and contract rights apart from its lawful patent monopoly.

Hughes has never brought an infringement suit upon a patent where it or its employees had not actually developed the patented device, proved it in the field, and engaged in the manufacture and leasing of such device.

The purpose of the infringement suits brought by Hughes was to protect its lawful patent monopoly and not to prevent lawful competition. In so doing, it was guilty of no misuse of its patents. Section 271 of the Act of July 19, 1952,[7] 66 Stat. 811, 35 U. S. C. A., Sec. 271, in part provides:

> "(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: • • • (3) sought to enforce his patent rights against infringement or contributory infringement."

It was only natural for Hughes to attack the unlawful retipping process at its source and to proceed against retippers who had brazenly trafficked in stolen Hughes bits and bits otherwise unlawfully acquired, rather than proceeding against producing oil companies and drilling contractors, many of whom were its own lessee customers. In so doing, no improper motives can be attributed to Hughes.

While we hold for the reasons hereinafter more fully set forth that Patent No. 2,333,746 is invalid for want of invention, Hughes was fully justified in bringing the instant actions for alleged infringement of that patent by the defendants. The bit covered by that patent was primarily designed for use in softer formations. That was a field in which Hughes' competitors had provided a more satisfac-

7. An act to revise and codify the laws relating to patents.

tory bit. The bit covered by that patent met problems of drilling in the softer and more plastic formations, which Hughes, with all its research organization, theretofore had not been able to solve, and it enjoyed very substantial commercial success. By virtue of 66 Stat. 812, 35 U. S. C. A. Sec. 282, that patent was presumed to be valid and the burden of establishing its invalidity rested upon the party asserting invalidity. Moreover, Chief Judge VAUGHT, a judge of long experience and recognized ability in the field of patent law, was of the opinion the patent is valid. In view of all these circumstances, it cannot be said that Hughes' claim that the patent is valid and infringed was in anywise without substantial basis, or that it acted in bad faith in attempting to assert its claimed rights under that patent.

A comparison of Hughes' patent policy, as reflected by the record in the instant cases and the policy of Kobe, Incorporated, in *Kobe, Inc.*, v. *Dempsey Pump Co.*, 10 Cir., 198 F. 2d 416, relied upon by Judge WALLACE and counsel for the defendants, clearly distinguishes the *Kobe* case from the instant cases. In that case, Kobe designed a plan to monopolize the rodless pump industry by the acquisition of all the important patents in the field and the elimination of all actual and potential competitors.

When Kobe decided to enter into the business of manufacturing rodless pumps, it concluded it was essential to acquire certain patent rights held by one Crum and one Humphreys. The latter was a pump manufacturer. It was unable to obtain those patents immediately. Later, the Rodless Pump Company acquired the exclusive rights to the Crum and Humphreys patents, and other important patents relating to the hydraulic pump, and commenced the manufacture of such pumps. Kobe then entered into an agreement with Rodless to form a patent holding company which was organized under the name of Roko Corporation. The patents held by Rodless were transferred to Roko and it proceeded to acquire all of the important patents relating

to rodless pumps, as well as to acquire future patents in that field. By the terms of the original agreement and subsequent agreements, Rodless was eventually entirely eliminated from the competitive field.

Typical of Roko's actions to eliminate competitors and potential competitors were two agreements, one entered into with Arthur Gage and the other with Alta Vista Hydraulic Company, a corporation organized and controlled by Gage. The agreement between Gage and Roko provided that for a consideration of $12,000 Gage would transfer to Roko seven patents held by him, free from any license agreements; that Gage would not engage in any business or accept any employment in any way detrimental to Roko or its licensees for a period of five years; that Gage would transfer to Roko any inventions or patents relating to rodless pumps, or which might be embodied in or used with rodless pumps competitive with those manufactured by Roko or its licensees which he might acquire within a 10-year period, and that neither Roko nor its licensees would ever be obligated to manufacture, sell or use any devices embodying the inventions of Gage. In the other agreement, Alta Vista gave Roko an exclusive license to patents held by it and Alta Vista agreed that should it acquire any patents in the future, relating to hydraulic pumps or any device capable of use in connection therewith, that it would grant exclusive licenses therefor to Roko and its licensees. In a later agreement, Alta Vista further agreed that the license agreement to Roko was exclusive as to Alta Vista. The first agreement with Alta Vista also provided that royalties should be paid on the basis of the sale of Kobe pumps and not on the basis of pumps manufactured under patents licensed from Alta Vista. Kobe succeeded in acquiring control of all the known patents pertaining to the manufacture of hydraulic pumps and Roko actively engaged in the acquisition of all future patents in the field for the benefit of Kobe. After Kobe had acquired a complete patent monopoly, it began to engage actively in the manufacture of hydraulic pumps, but none of them embodied the inven-

tions disclosed by the patents which it obtained from Gage, Alta Vista and others, with the possible exception of certain features of the Humphreys patents. Those facts in the *Kobe* case led the trial court to conclude in that case that the patents were acquired solely as insurance against competitive manufacture by others. For many years Kobe had an absolute monopoly in the manufacture of rodless pumps. When the Dempsey Pump Company, defendant in the *Kobe* case, threatened Kobe with competition, Kobe immediately brought a patent infringement suit, supplemented by a persistent effort by Kobe to create a customers' boycott of the Dempsey pump.

> "Within the limits of the patentee's rights under his patent, monopoly of the process or product by him is authorized by the patent statutes."[8]

> "The very object of these laws (the patent laws) is monopoly * * *."[9]

The incentive offered by the patent laws to encourage development in the arts and sciences is the monopoly given for a term of years. The anti-trust laws are not directed at lawful patent monopoly.[10]

In contracting for the use of his patent device, the patentee may impose restrictions on the use thereof, either as to time or space, or any other restriction upon the exercise of the granted privilege, save only, that he may not attach a condition to the right given that will enlarge the monopoly granted him by his patent, and thus acquire a monopoly which the statutes and the patent did not give him. Here, the Hughes lease agreement merely provided for the termination of the right to use on the happening of a future event, namely, the termination of the useful life of the original cutter teeth and/or the bearings. It was simply a limitation as to time.[11]

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8. United States v. Line Material Co., 333 U. S. 287, 305.
9. Bement v. National Harrow Co., 186 U. S. 70, 91.
10. Vulcan Mfg. Co. v. Maytag Co., 8 Cir., 73 F. 2d 136, 138; United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289, 291.
11. Williams v. Hughes Tool Co., 10 Cir., 186 F. 2d 278, 284.

Section 3 of the Clayton Act does not impinge upon the lawful monopoly granted to a patentee, namely, the exclusive right to manufacture, use and vend the patented device. It does not prohibit him from inhibiting the manufacture, use or sale or restricting the manufacture, use or sale of the patented device by others.

It does prohibit the patentee from making a contract which imposes limitations beyond his lawful patent monopoly on the right of his lessee or purchaser to use or deal in goods, wares, merchandise, supplies, or other commodities of a competitor where so to do will substantially lessen competition or tend to create a monopoly.[12]

The Hughes lease contains no "tie-in" provision, express or implied. It does not restrict in any way the right of the lessees to use or deal in the goods of a competitor.

In the *Ford* case, Judge WALLACE found that since 1936 Hughes has dominated the rotary drilling bit industry. That conclusion is based primarily on the premise that Hughes manufactures approximately 75 per cent of the rotary drilling bits used in the drilling industry. The record discloses that such premise is based, not upon accurate evidence of the total bits manufactured, but upon incomplete and possibly inaccurate estimates of the total bits manufactured. However, for the purposes of this opinion, we will assume, without deciding, that the 75 per cent figure was approximately correct. During all of the period involved in the instant cases, Hughes has had a lawful patent monopoly, under one or more of its patents, the validity of which has been established by the adjudicated cases. The evidence clearly shows that the large volume of business which Hughes enjoys, especially with respect to its bits designed for drilling in medium and hard formations, is due to its lawful patent monopoly under its valid patents, unaccompanied by any "tie-in" agreements or other unlawful competitive practices, and is due to the further fact that it man-

12. Steiner Sales Co. v. Schwartz Sales Co., 10 Cir., 98 F. 2d 999, 1007, 1008, and cases cited in Notes 10 and 11 thereto.

ufactures the most efficient, the most economical, and the best bit on the market for use in the medium and hard formations and renders excellent service to users of its bits.

The purpose of the Sherman Act is to prevent restraint of trade and the monopolization of any part of trade or commerce,[13] to foster competition by lawful means and not to eliminate it.[14] The purpose of the Clayton Act is not to prevent competition, but to preserve legitimate competition and prevent unlawful and unfair discrimination and other unlawful competitive practices.

Moreover, the Sherman Act does not make mere size of a corporation, nor the continued exercise of its lawful power an offense, when that size and power have been obtained by lawful means and developed by natural growth. Neither does it make the existence of unexerted power an offense.[15]

The Serman Act was not directed against one "who happens by his skill and energy to command an innocent and legitimate monopoly of a business."[16] One who gains a large portion of a market by manufacturing a better product and by furnishing better service to his customers, which constitutes legitimate competition, is not denounced by the Sherman Act.[17]

The maintenance of a research department, the carrying on of intensive research, constant efforts to improve the manufactured products and to render better service to customers by a manufacturer are not condemned by Section

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13. United States v. Yellow Cab Co., 332 U. S. 218, 226.

14. Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231, 248, 249; American Column Co. v. United States, 257 U. S. 377, 400; Agnew Hosiery Co. v. Leader, 310 U. S. 469, 493, and Note 15 thereto; Standard Oil Co. v. United States, 221 U. S. 1, 58; White Bear Theatre Corp. v. State Theatre Corp., 8 Cir., 129 F. 2d 490, 494; Northwestern Oil Co. v. Socony-Vacuum Oil Co., 7 Cir., 138 F. 2d 867, 870; Oxford Varnish Corp. v. Ault & Wiborg Corp., 6 Cir., 83 F. 2d 704, 707.

15. United States v. United States Steel Corp., 251 U. S. 417, 451, 452; United States v. International Harvester Co., [illegible] U. S. 693, 708; United States v. Aluminum Co. of America, 2 Cir., [illegible] 148 F. 2d 416, 430.

16. 21 Cong. Rec. 3151 (1890).

17. In re Greene, C.C. S.D.Ohio, 52 F. 104, 115; United States v. American Naval Stores Co., C.C. S.D.Ga., 172 F. 455, 458; United States v. Standard Oil Co., C.C. E.D.Mo., 173 F. 177, 181.

1 and are not a violation of Section 2 of the Sherman Act.[18] That Act does not condemn business success, arising from quality and performance of a manufacturer's product.

Here, Hughes' position as the largest manufacturer and distributor of drilling bits is not attributable to any unlawful practice.

Any notion that Hughes controls the market or enjoys a monopoly in the rotary drilling bit industry is clearly refuted by the record. The Reed Roller Bit Company[19] has prospered and, in the past 15 years, has expanded its production of rotary drilling bits between 400 and 500 per cent. Chicago Pneumatic Tool Company,[20] a substantial corporation with a large volume of business, had expanded several times prior to the trial of the instant cases and was then engaged in another large expansion program in Texas, including the construction of a new plant, which would increase its then productive capacity two and one-half or three times. The Varel Manufacturing Company, which entered the business of manufacturing rotary drilling bits in 1947, had made a very substantial growth and had recently moved into a new and enlarged plant. The Security Engineering Company, manufacturer of rotary drilling bits, had recently completed a $2,000,000 plant in Dallas, Texas.

In the softer formations drag bits, disc bits, cross-roller bits and new cone bits are used. It was not until the development of the bit disclosed by Patent No. 2,333,746 that Hughes produced a bit that performed as well in the softer formations as the bits of Hughes' competitors. Since that patent is invalid, the disclosures thereof are free for use by Hughes' competitors. The bits of Reed are primarily designed for use in the softer formations. During the entire period involved, they afforded effective competition with Hughes' bits, especially those designed for drilling in the softer formations, and, as elsewhere herein indicated, Reed

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18. United States v. E. I. DuPont de Nemours & Co., D.C.Del., 118 F. Supp. 41, 216, 217.

19. Hereinafter called Reed.

20. Hereinafter called Chicago Pneumatic.

has prospered and expanded the production of its bits between 400 and 500 per cent. Improved drag bits afford effective competition with the Hughes bits designed for drilling in the softer formations. Drag bits are used extensively in Gulf Coast shales. In 1951, 21 manufacturers were making and selling fish tail and drag bits. One manufacturer of a specially designed rock cutter bit advertised that its improved bit would out-drill either drag or roller bits in the Gulf Coast shales and in New Mexico had resulted in a saving in drilling time of 30 per cent over soft formation roller drilling bits. The Hughes bits which have enjoyed the greatest market success are those designed for drilling in the medium and hard formations. There Hughes comes into competition with cross-roller bits and cone bits of other manufacturers. Diamond bits also come into direct competition with the Hughes bits designed for drilling in the harder formations. Many of the large oil developing companies have ceased to use Hughes bits and are using diamond core bits in certain types of the harder formations for the reason that the diamond core bit drills faster and is more economical, since it is not necessary to pull it out and change bits.

Retipped bits are not as sound metallurgically as new bits. They do not give the service that a new bit gives, and they are only practical for use in the softer formations. As soon as drilling progresses much beyond 3,000 feet, the cost of changing a bit will exceed the cost of a new bit. At greater depths a retipped bit will not be used. Hence, retipped bits do not come into competition with Hughes bits designed for drilling in the harder formations, the field in which Hughes enjoys its greatest market success.

Retipped bits in the competitive field are of comparatively minor importance.

Judge WALLACE relied heavily upon the decision of the Second Circuit in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416. For many years prior to 1886 aluminum was isolated as a metal, but it was not until that year that

it became commercially practical to eliminate the oxygen so that it could be exploited industrially. One Hall discovered a process by which this could be done in 1886 and obtained a patent on the process on April 2, 1889, which he assigned to the Aluminum Company. Bradley invented a process by which the smelting could be carried on without the use of external heat, which had theretofore been thought necessary, and obtained a patent on his process on February 2, 1892. He granted the Aluminum Company an exclusive license under his patent. During the period of the patents, the latter one expiring February 2, 1909, it was impossible for anyone to compete with the Aluminum Company in the manufacture of aluminum because of its patent monopoly and the Aluminum Company produced practically 100 per cent of aluminum ingot. In the district court, in that case, the United States conceded that there had been no unlawful monopolization by the Aluminum Company prior to February 2, 1909, for the reason that it was protected by its patent monopoly up to that date and that the monopoly in both bauxite and the manufacture of aluminum which it held at the expiration of said patents was lawful.[21] The decree against the Aluminum Company in that case was based, not upon misuse of its patent monopoly, but upon monopoly resulting after the expiration of the patent period by reason of unlawful competitive practices. Here, Hughes has not been guilty of discrimination or other unlawful competitive practices.

The record discloses that when Hughes changes the prices of its bits, its competitors change their prices to correspond with the prices set by Hughes.

Hughes published a price change on May 25, 1934. On August 1, 1935, Reed published a price list which followed the prices fixed by Hughes in 1934. More recently, Reed, when Hughes increased the price of its bits, followed with a like increase on the day following the announcement of

21. United States v. Aluminum Co. of America, D.C. N.Y., 44 F. Supp. 97, 115.

the Hughes increase, and other competitors increased their prices to correspond to the Hughes prices within a few weeks after the Hughes increase.[22]

The record is devoid of any evidence of any understanding, arrangement, or agreement, express or implied, between Hughes and other bit manufacturers to fix the price of bits. Moreover, Hamaker, vice president in charge of sales, of Reed, testified that there was no such understanding or agreement. Miller, manager of the Oil Tool Division of Chicago Pneumatic, testified to the same effect. Hughes' president, its executive vice-president, its senior vice president and managing director, a former sales manager, and other sales personnel denied that there was any understanding or agreement with Reed or any other of Hughes' competitors to fix prices. Hamaker testified that with rising costs, Reed desired to increase its prices, but was reluctant to take the lead in price increases and preferred to follow others. He further testified that when price increases were made, Reed learned of it immediately. He further testified that while Hughes was the largest bit manufacturer, it did not dominate the price of bits fixed by Reed, and did not prevent Reed from fixing its prices at more or less than the prices fixed by Hughes, and that Reed followed the price increases made by Hughes because it was advantageous for it to do so. Other witnesses testified that it was common to find competitors having the same or similar prices for similar goods, and that there were many examples of price changes made by competitors immediately after another competitor had changed its prices. One witness testified that such changes usually were made within periods varying from one hour to two weeks.

22. On July 23, 1948, Hughes sent out a notice by telegram of a price increase of 12 per cent, effective July 24. On July 24, Reed sent a telegram to supply companies, stating that on July 25 its prices would be increased 12 per cent. Chicago Pneumatic, H. C. Smith Tool Company, and Globe Oil Tool Company raised their prices within a few weeks thereafter. On November 30, 1950, Hughes sent a telegram to a supply company stating that on December 1 its prices would be increased 10 per cent. Reed sent a telegram to its supply companies on December 1, setting out a price increase on certain of its products at 10 per cent and on other of its products at 5 per cent.

The mere fact that Reed increased its prices the day following an increase by Hughes does not indicate any prearrangement. Hughes sent out notice of proposed increases and that fact immediately became known to Reed and other competitors of Hughes.

The record does not support the statement of Judge WALLACE in the *Ford* case that a price change could not be brought about immediately and without painstaking research and preparation. That might be true of a price decrease, but certainly it would not be true of a price increase. Competitors knew that rising costs necessitated a price increase and they were ready to increase their prices whenever Hughes increased its prices.

The testimony of responsible officials of Reed and Chicago Pneumatic shows that other rotary bit manufacturers followed Hughes' prices in the exercise of their own judgment and in order to offset increasing manufacturing costs and make greater profits.

The fact that Reed and other manufacturers of rotary drilling bits could price their products at the same price of corresponding bits manufactured by Hughes and sell them in increasing numbers and at substantial profits, as shown by this record,[23] indicates competition and not lack of competition with Hughes. Moreover, the fact that competitors may see proper, in the exercise of their own judgment, as in the instant cases, to follow prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.[24]

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23. Reed and Chicago Pneumatic were not feeble competitors, dominated by Hughes. In 1951, Chicago Pneumatic produced and sold 25,000 roller bits and at the time of the trial was in the midst of an expansion program, which would increase its production in excess of 60,000 roller drilling bits.

    Hamaker testified that in the past 15 years this business had increased four or five times and it has maintained a strong position in the industry.

24. United States v. International Harvester Company, 274 U. S. 693, 708, 709; United States v. United States Steel Corp., 251 U. S. 417, 448, 449.

Judge WALLACE points to the profits made by Hughes as indicative of price control, and counsel for the defendants urge that such profits "are certainly an indication of monopoly prices" and cite in support thereof *United States v. Eastman Kodak Co.*, D.C.N.Y., 226 F. 62. The evidence in the *Eastman Kodak* case showed that the defendant in 15 years' time bought out 20 competitors, dismantled their plants, purchased the entire control of the imported raw paper, which was the only standard paper for manufacturing photographic printing-out paper, refused to sell such paper to competitors, fixed resale prices, and made profits of 63 per cent. No such facts exist in the instant cases. We set out Hughes' profits before taxes for the period from 1940 to 1951, inclusive, in marginal note 25.

Counsel for the defendants point to their Exhibit 64, a Standard & Poor's publication, which they say reflects the profits "for similar type of manufacturing." The publication reflects only the profit record of two manufacturers of rotary drilling bits, Chicago Pneumatic and Ingersoll-Rand Company. Counsel for the defendants state that Hughes admits for the years 1940 to 1945 its profits varied from 23.4 per cent to 32.4 per cent before taxes, except for the year 1945, which they say was apparently a conversion year. They fail to point out that in the same period, Chicago Pneumatic's profits varied from 25.8 per cent to 39.3 per cent and Ingersoll-Rand's profits varied from 26.1 per cent to 37 per cent. During the period 1940 to 1945, the average annual profits of the three companies before taxes were: Chicago Pneumatic, 32.7 per cent; Ingersoll-Rand Company, 30.7 per cent; Hughes Tool Company, 25.2 per cent.

The same Exhibit 64 states, "Since overhead is relatively inflexible and accounts for a large proportion of manu-

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25. 1940 - 30.8%
1941 - 32.4%
1942 - 23.4%
1943 - 25.4%
1944 - 26.4%
1945 - 12.7%
1946 - 32.3%
1947 - 39.6%
1948 - 42.2%
1949 - 41.5%
1950 - 48.4%
1951 - 53.1%

facturing costs, profit margins are volatile. Spreads tend to widen sharply as volume expands beyond the break-even point. * * *" During the period 1946 to 1951, inclusive, Hughes' leases of rotary drilling bits more than doubled. With a relatively inflexible overhead, Hughes' profits necessarily increased. But the net profits enjoyed by Hughes were not exorbitant. For the period 1940 to 1951, inclusive, Hughes' net profits were:

1940 - 23.47%	1946 - 20.02%
1941 - 22.39%	1947 - 24.55%
1942 - 14.03%	1948 - 26.18%
1943 - 15.29%	1949 - 25.77%
1944 - 15.89%	1950 - 23.25%
1945 - 7.64%	1951 - 17.01%

In his opinion in the *Ford* case, Judge WALLACE concluded that Hughes had engaged in an "invasive sales policy." The conclusion is predicated first on the fact that Hughes changed from delivery of its bits through supply houses to a direct delivery to customers, in order that its sales personnel "would regularly visit all active drilling rigs." Of course, there is nothing inherently wrong in sales personnel visiting customers. Moreover, the reason which actuated the change was not the one suggested by Judge WALLACE. Direct delivery was made, in order that the bit delivered would be best suited to the driller's requirements and to maintain a record identifying each bit delivered, obtain a record of its performance during its useful life and secure its return for research purposes. Such conclusion is based on the further premise that Hughes made an improper use of the royalty reports made by Reed to Hughes as patent licensor. The royalty reports showed sales, less returns of Reed complete bits and spare parts by sizes, but showed nothing with respect to customers or areas. Hughes' sales force in the field checked in the respective areas with supply companies and reported sales of each type in each area. This was done to check the accuracy of the reports submitted by Reed. Reed was a sub-

stantial competitor of Hughes, but all that Hughes did was to endeavor to meet by lawful methods Reed's competition. The Reed bits were out-performing the Hughes Simplex bit. Hughes met that competition by developing and putting on the market an improved product. The conclusion is further based on correspondence between Hughes and the Bethlehem Steel Company, with respect to Chicago Pneumatic. Charles M. Schwab was an executive of Bethlehem and held a large interest in Chicago Pneumatic. Because of intimate relations between Bethlehem and Hughes, Bethlehem had access to Hughes' plant and had been permitted to study Hughes' manufacturing and heating treatment methods and to learn what the analyses of all steel entering into Hughes' production disclosed. What Hughes protested against was the use of that confidential information for the benefit of Chicago Pneumatic. It was not undertaking to prevent competition, but to prevent use of confidental information to further unfair competition. Hughes did not threaten to cut off its purchases from Bethlehem. It indicated merely that the confidential relationship under which Bethlehem had access to Hughes' plant, which in turn gave it access to important information with respect to Hughes' processes, had to be terminated.

In his opinion, Judge WALLACE stated that "the 'effect' achieved by the lease agreement * * * is clearly within the broad language of Section 3 of the Clayton Act."[27]

15 U. S. C. A., Sec. 14, (Sec. 3 of the Clayton Act) provides:

> "*Sale, etc., on Agreement Not to Use Goods of Competitor.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale, or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any

27. The counterclaims did charge a violation of the Clayton Act.

insluar possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The language of Sec. 3 (15 U. S. C. A., Sec. 14, *supra*) makes it clear that the lease, sale, contract or practice prohibited is one that imposes a condition, agreement or understanding that the lessee or purchaser shall not use or deal in goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller. The Hughes leasing agreement contains no such condition, agreement, or understanding, express or implied. Lessees were entirely free, so far as the provisions of the leasing agreement are concerned, to lease, purchase or use bits of Hughes' competitors, including bits reconstructed by retippers.

We conclude there was no violation of the Clayton Act.

Upon a careful consideration of the entire record, we conclude that the findings made by Judge WALLACE in the *Ford* case, upon which he based his conclusion that Hughes had violated the Sherman Act and the Clayton Act, are clearly erroneous, and that the findings made by Judge VAUGHT in the *Conaghan* and *Cole* cases, which are converse to those made by Judge WALLACE on such issues, are clearly supported by the evidence and should be adopted by this court.

Patent No. 2,333,746.

Patent No. 2,333,746, known as the Scott, Garfield and Cockrum patent,[27] the individuals named being assignors

27. Hereinafter referred to as the patent in suit.

to Hughes, was issued November 9, 1943, upon an application filed July 11, 1940. It relates to the formation of the teeth upon the drill cutters of rotary drilling bits.

Fletcher, by his invention in Patent No. 1,856,627, in suit in *Williams* v. *Hughes Tool Co.*, 10 Cir., 186 F. 2d 278, achieved two substantial improvements in the efficiency of rotary drilling bits. (1) Fletcher reduced the number of teeth on the cutter, except the teeth on the outer row, and thereby increased the weight unit loading upon each tooth, and increased their penetration and effectiveness; (2) Fletcher also positioned the teeth, other than the teeth in the outer row on the cutter, out of alignment longitudinally. Such staggering of the teeth inside the outer row of teeth eliminated the tendency of the teeth to drag and bounce from one row to the other as the cutter revolved and thus effected more uniform cutting of the entire bottom of the hole. Fletcher did not attain his objectives with respect to the outermost rows of teeth on the rotating cutters. Such teeth cut the outermost portion of the hole and provide the traction for the rotating cutters. In the patent in suit, the problem was solved as to the outer row of teeth on the cutters by providing what the patentee calls "interrupted teeth" with crests that are shorter than those on other teeth in the outer rows of the cutters. In such patent there is also substituted for two or more circumferential rows of the teeth at the heel or adjacent to the base of the cutter, one row of teeth with long crests interspersed with interrupted teeth of shorter crests. In such patent the interrupted teeth are also staggered, as taught by Fletcher, so that the teeth in the rows do not continuously track in their previous imprints made upon the bottom of the hole, in order to accomplish uniform cutting of the entire bottom of the hole.

By forming teeth with shorter supporting crests, greater space is provided into which material displaced by the chisel stroke of the teeth may move, enabling the flushing fluid in the hole to better engage and carry away the displaced material and preventing balling-up of the cutter teeth.

Scott and Wellensiek Patent No. 1,647,753, in suit in *Williams Iron Works Co.* v. *Hughes Tool Co.*, 10 Cir., 109 F. 2d 500, taught the use of widely spaced teeth that would readily free themselves of adhering material through the force of the flushing fluid.

The claims in suit are numbers 1 and 4, which read as follows:

"1. In a well drill, a tapered cutter rotatably mounted thereon, said cutter having a row of heel teeth circumferentially thereof to cut the outer portion of the well bottom, some of the teeth in said row having a portion projecting from the cutter surface a shorter height than the others, thus providing on said shorter teeth an open area normally out of contact with the well bottom so as to allow cleaning of the cutter by the flushing fluid, and a gage cutting surface on the outer ends of all said teeth to engage the wall of the well.

* * * * * * * *

"4. In a well drill, an inwardly tapering cutter having a row of teeth circumferentially around the same, the outer ends of which are positioned to cut the side wall of the hole, there being crests on said teeth positioned to engage the bottom of the well, the crests on some of said teeth being comparatively short and extending from the inner ends of said teeth approximately one-half of the length of the tooth, there being formation receiving spaces at the outer ends of said short crested teeth some of said teeth being spaced more closely together in the row to throw the teeth out of step on bottom."

The bit of the patent in suit was designed for use in soft formations, but it has been found to be efficient in formations somewhat harder than those for which it was originally developed.

The device of the patent in suit has enjoyed marked commercial success. It has increased drilling speed approx-

imately 32 per cent and bit life approximately 25 per cent, thereby effecting a very substantial decrease in drilling costs.

Under 35 U. S. C. A. Supp., Sec. 282, a patent is presumed to be valid and the burden of establishing invalidity rests on the party asserting it.

An improvement to be patentable must not only be new and useful, but must involve invention. 35 U. S. C. A. Supp., Section 101.

A patent may not be obtained if the differences between the subject-matter sought to be patented and the prior art are such that the subject-matter as a whole would have been obvious to a person having ordinary skill in the art to which such subject-matter pertains. 35 U. S. C. A. Supp., Section 103.

It is well settled that the mere carrying forward or extended application of an earlier idea or conception of another, involving a change only in form, proportion, or degree, where the same work is performed in the same way by substantially the same means, although with better results, is not invention.[28]

While the device of the patent in suit resulted in marked improvements over prior bits for drilling in soft formations, we think it merely carried forward and was a more extended application of the earlier teachings of Fletcher Patent No. 1,856,627 and the Scott and Wellensiek Patent No. 1,647,753 and involved only a change in form, proportion, or degree, whereby the same work is performed in the same way by substantially the same means, although with better results. We further think that the differences between the subject-matter of the patent in suit and the prior art would have been obvious to a person having ordinary skill in the art to which such subject-matter pertains.

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28. B. F. Goodrich Rubber Co. v. Gates Rubber Co., 10 Cir., 54 F. 2d 580, 582, 583; Linville v. Milberger, 10 Cir., 34 F. 2d 386, 388, 389; Sage v. Parkersburg Rig & Reel Co., 10 Cir., 80 F. 2d 954, 957; Sinclair Refining Co. v. Coe, C.A.D.C., 138 F. 2d 673, 674.

Accordingly, we hold the claims in suit invalid for want of invention.

That part of the judgment in the *Cole* and *Conaghan* cases holding the claims in suit of Patent No. 2,333,746 valid and infringed and enjoining the infringement of such claims is reversed and such judgment in all other respects is affirmed. That part of the judgment in the *Ford* case which denied Hughes relief on the ground it had violated the Sherman and Clayton Acts and which awarded Ford relief on the counterclaim is reversed. Such judgment in other respects is affirmed, and the cause is remanded, with instructions to dismiss the counterclaims and proceed further in accordance with the views herein expressed.

One-half of the costs in this court in each case shall be assessed against the appellant and one-half against the appellee.

No. 4785-6-7 - D. B. COLE v. HUGHES TOOL COMPANY, etc.

MURRAH, Circuit Judge, dissenting:

I would reverse Judge VAUGHT and affirm Judge WALLACE for precisely the reasons set forth in the opinion by Judge WALLACE, reported 114 Fed. Supp. 525. It is my view that the factual distinctions he so meticulously draws between these cases and prior litigation are clearly and abundantly supported by the evidence, and irresistibly lead to the conclusions he reached. I can add nothing to the fullness of the views expressed in his opinion.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 475

R. W. FORD, D. B. COLE and B. F. CONAGHAN,
Petitioners,

vs.

HUGHES TOOL COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI.

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Appendix A

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 475

R. W. FORD, D. B. COLE and B. F. CONAGHAN,
Petitioners,

vs.

HUGHES TOOL COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinions of the District Court are reported at 113 Fed. Supp. 519, 113 Fed. Supp. 527 and 114 Fed. Supp. 525. The opinion of the Court of Appeals is reported at 215 Fed. 2d 924 (Advance Sheet No. 7, Nov. 22, 1954). The Findings of Fact of the District Court in the *Cole* and *Conaghan* cases which were adopted by the Court of Appeals are printed in Appendix A hereto.

QUESTIONS PRESENTED.

The questions presented in the Petition for Certiorari (page 2) do not arise from this record. The legal principles applied are well settled and the issues in the District Courts and in the Court of Appeals were factual ones.

The questions which the record presents are:

1. Whether this Court in the exercise of its discretion should review a final decision of the Court of Appeals that turned solely upon an evaluation of the evidence and which was in conformity with similar prior decisions in the 5th and 10th Circuits.

2. Whether this Court in the exercise of its discretion should review a final decision of the Court of Appeals that turned upon an evaluation of the evidence and which adopted the findings of fact of the District Court for the Western District of Oklahoma in two of the cases here sought to be reviewed as clearly supported by substantial evidence, in the absence of any showing by the three Petitioners that such concurrent findings of said District Court and of the Court of Appeals were clearly erroneous.

3. Whether this Court in the exercise of its discretion should review a decision of a Court of Appeals that turned upon an evaluation of evidence and adopted the Findings of Fact of one District Court as clearly supported by the evidence and rejected as clearly erroneous the converse Findings of Fact of another District Court in a companion case upon which said other Court based its conclusion that Respondent had violated the Sherman Act and the Clayton Act.

4. Whether the Court of Appeals properly held in conformity with its prior decisions in a similar case in which certiorari was denied by this Court and also in conformity with a prior decision of the Court of Appeals for the Fifth Circuit in which certiorari was denied involving the same lease agreement of Respondent under which patented rock bits of its manufacture were distributed and which enabled Respondent to repossess its

worn-out bits on expiration of the lease term for engineering study, comparison and research, was valid, reasonable, practical and fair and a lawful method of exercising its property, contract and patent rights.

STATEMENT OF THE CASE.

There is no showing of any special or important reason why this Court should in the exercise of sound judicial discretion grant the Petition for Certiorari. There is no conflict of decision. On the contrary, the decision of the Court of Appeals conforms to its prior decision in a similar case, *Williams* v. *Hughes Tool Company*, 186 Fed. 2d 278 (Tenth Circuit), certiorari denied by this Court, 341 U.S. 903, rehearing denied 341 U.S. 934, second petition for rehearing denied 341 U.S. 956. The decision of the Court of Appeals further conforms to a prior decision of the Court of Appeals for the Fifth Circuit holding the Respondent's lease agreement here involved to be practical, reasonable and completely fair. *Robertson Rock Bit Company, Inc., et al.*, v. *Hughes Tool Company*, 176 Fed. 2d 783, certiorari denied 338 U.S. 948, rehearing denied 340 U.S. 923, second petition for rehearing denied 340 U.S. 939. The decision of the Court of Appeals also conforms to its prior decision that Respondent's system of leasing its patented bits was a lawful exercise of its property and contract rights apart from its patent monopoly, 199 Fed. 2d 862.

The three cases of identical nature here sought to be reviewed were brought by Hughes Tool Company (hereinafter called "Respondent" or "Hughes") against a defendant engaged in reconstructing and retipping rock bits of Respondent's manufacture and rock bits of numerous other manufacturers. No issue is presented of the operations of the three Petitioners in acquiring, retipping and selling rock bits manufactured by other manufacturers.

The complaint in each case alleges that Hughes owned various letters patent relating to rock bits used in the drilling of wells for oil and gas and that the bits of its manufacture embodied one or more patents of its ownership. The complaint in each case further alleged that Hughes did not sell its rock bits, but instead leased them with a provision in the lease agreement that when the original cutter teeth or bearings had served their useful life the user would surrender the bits to Hughes upon request and that in accepting delivery of such bit the user agreed not to surrender such bits to other than a duly authorized representative of Hughes. With full knowledge that rock bits of Hughes manufacture were not sold but remained the property of Hughes and were marked as its property, each Petitioner unlawfully acquired the worn-out bits of Respondent from a lessee, or by purchase from a "roughneck" or someone whose principal business or sideline was the acquiring and the selling of worn-out bits.

The District Court for the Eastern District of Oklahoma found that Petitioner Ford ignored Respondent's lease and bought and sold the worn-out bits that were owned by Respondent, and that in said Petitioner's drilling operations he frequently used drill bits of Respondent's manufacture and ownership, not leased to him but originally leased to others, retipped, and then sold to said Petitioner.

The District Court for the Western District of Oklahoma made the finding that Petitioners Cole and Conaghan, with knowledge of the provisions of the Respondent's lease agreement and with knowledge that drill bits of Respondent's manufacture and ownership are marked as its property and that Respondent retained title thereto,

have trafficked in wornout bits of Respondent's manufacture and ownership, have bought such bits from lessees, employees of lessees, and others, and have sold worn-out bits of Respondent's manufacture and ownership, some of said worn-out bits having been reconstructed by each Petitioner or by others, all without Respondent's consent. Said District Court further found that Petitioners Cole and Conaghan, with knowledge that Respondent's bits have been stolen, have bought such bits without knowing or caring whether or not they were stolen. Such findings are supported by substantial testimony, as well as testimony of the Petitioners themselves.

In the *Cole* and *Conaghan* cases, each of the three patents in suit was adjudged to be valid and infringed and the respective defendants were adjudged to have converted Hughes bits and to have interfered with Hughes property and contract rights. On the counterclaim in each of said cases the Court adjudged that Hughes had not violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. In the *Ford* case, two of three patents in suit were adjudged to be valid and infringed, and the third patent was adjudged to be invalid for want of invention. Based on clearly erroneous findings of fact, such Court adjudged that Hughes should be denied any relief because of its violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, and that defendant Ford, on his counterclaim, should recover treble damages, costs and attorneys' fees.

The Court of Appeals found that the third patent in suit was invalid for want of invention, but in all other respects affirmed the judgment of the District Court in the *Cole* and *Conaghan* cases. The Court of Appeals reversed that part of the judgment in the *Ford* case which denied Hughes relief on the ground that it had violated

the Sherman and Clayton Acts and remanded the cause with instructions that the counterclaim be dismissed.

These three cases are strikingly similar to the case of *Williams* v. *Hughes Tool Company*, 186 Fed. 2d 278, decided by the Tenth Court of Appeals, in which certiorari was denied by this Court. The *Williams* case was heard and decided by District Judge Vaught of the Western District of Oklahoma, who also heard and decided the *Cole* and *Conaghan* cases. In his opinion in the *Cole* case, which was adopted and made his opinion in the *Conaghan case*, Chief Judge Vaught stated at page 520:

> "This case is one of a series, involving the same character of testimony, that have been tried and determined in this Court, the Court of Appeals and Federal Courts in other jurisdictions, which raised practically the same issues of both law and fact."

The unusual feature of the Petition for Certiorari is the attempt to seek a review of three companion cases and the setting aside of the concurrent findings of the District Court for the Western District of Oklahoma and of the Court of Appeals in two of such cases, without pointing out in any single respect why such concurrent findings are clearly erroneous and do not support the conclusion of both of said courts that Respondent had not violated the Sherman and Clayton Acts. Instead the Petitioners completely ignore such concurrent findings and base their petition solely upon those converse findings of fact in the third of such cases that form the basis of the conclusion of the District Court for the Eastern District of Oklahoma that Respondent had violated such Anti-Trust Acts, even though such findings were set aside as clearly erroneous by the Court of Appeals. Such presentation is an adroit effort to obviate the basic rules of this Court as to reviewing fact findings on certiorari

by the simple strategy of completely ignoring the concurrent findings in two of the three cases.

In *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U.S. 498, 503, this Court said:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find a record tilting one way rather than the other, though fair minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony * * *."

In *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275, it was said:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The rule for the protection of the Court's jurisdiction is aptly summarized and a wealth of authority cited in *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, wherein the major portion of Petitioner's argument invited the court "to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below." At pages 213, 214, the Court stated:

> "This we cannot do. A seasoned and wise rule of this court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

The opinion of the Court of Appeals discloses that careful consideration was given to the entire record and to the findings of both District Courts in each of the three cases. Such opinion details why certain converse findings of the District Court for the Eastern District of

Oklahoma were found to be "clearly erroneous" and based upon unsubstantiated inferences and upon hearsay and incompetent testimony which was completely refuted by the credible testimony of every witness having personal and direct knowledge of the facts.

The District Court for the Eastern District of Oklahoma relied heavily on the testimony of the witness Mobley to support most of its important findings that lead to its conclusion that the Respondent had violated the federal anti-trust laws. Typical of said District Court's clearly erroneous findings was that the primary purpose for which Hughes initiated the lease agreement was to eliminate competition from repaired and retipped bits. Such finding was made despite the uncontradicted testimony that the lease agreement was initiated and used by Respondent years prior to the commencement of the practice of retipping bits. (DX 13, pp. 10, 15-16, Tr. 235-6.) The District Court for the Eastern District of Oklahoma made such finding solely on the testimony of the witness, Mobley. Mobley was formerly employed as an attorney by the law firm representing Hughes. At a later date he was hired by Hughes. Part of the background of his vindictive testimony—refuted by all the credible evidence—was his willingness to extract documents from Hughes' files and turn them over to Petitioners (Tr. 414) and his willingness—seemingly eagerness—to travel 500 miles to testify against his former client. He unequivocally and positively reiterated that his knowledge of the reason for Hughes leasing its bits was derived from hearsay and that his purported intimate information was obtained when he later represented Hughes as a lawyer, and because of that representation.

Mobley's testimony was as follows:

"Q. But you don't remember when that leasing practice came into being? A. No, sir. From my own information I can't say, except from what some people have told me.

"Q. And you don't know of your own knowledge the reason for that leasing agreement? A. Except from hearsay."

This testimony was called to Mobley's attention in the present cases and he reaffirmed its verity (Tr. 428-429).

In the present cases, Mobley testified (Tr. 290):

"Mr. Haight: And you got all of that information while you represented the company as a lawyer and because of your representation?

"The Witness: I am sure that's true. * * *

"Judge Vaught: That was after you became a lawyer?

"The Witness: Yes, sir, the intimate information came after I became a lawyer." (Tr. 291.)

Mobley further explained how he had as a lawyer acquired some of his purported information as follows:

"* * * I went all through their files, talked to them, visited the field and thoroughly familiarized myself with the idea in mind that I could then advise with them, because they knew that some serious legal questions were going to come in connection with the marketing of the bits. I wrote a brief on their suggested plan. I formed my own opinion, discussed with Mr. Andrews (senior member of the firm of attorneys by whom I was employed) as to whether it would work or not from the legal viewpoint, and also with Mr. Brown to try to determine whether it would work from a practical viewpoint. * * *" (Tr. 287.) (Parenthetical statement added.)

The Court of Appeals disregarded the testimony of Mobley primarily for the reason that it was clearly hear-

say as above shown, and also because substantially all of the material portions of his testimony constituted recitations of purported confidential information that came to him in his capacity as attorney for Hughes and was not admissible under the rule which precludes disclosure of privileged communications between attorney and client.

Mobley's testimony was clearly hearsay and was of a privileged character. The uncontradicted evidence established that from 1931 to 1939 he was an associate of the law firm which was general counsel for Respondent. During such period he was at no time in the employ of Respondent. His first employment with Respondent was in 1939 as "Industrial Relations Director." While Mobley was in the employ of the law firm he was assigned by said firm as a lawyer to advise with and handle for the Respondent certain of its legal problems. In this capacity as an attorney for Respondent he was given access to all of Respondent's files and thoroughly familiarized himself with them as shown by his above quoted testimony (Tr. 287). The testimony of Mobley in another case which was reaffirmed in the present cases was to the effect that he had been associated since 1931 with the law firm of Andrews, Kelley, Kurth & Campbell, general counsel for Respondent; that he had never spent his time during such association exclusively on the business of Hughes Tool Company (Tr. 424-426); that in so acting as attorney for Hughes Tool Company up to 1939 his duties were "just what any attorney did"; that he never was called upon to determine any legal policy but only advised with respect to it and particularly advised as to the legal policy relative to the distribution of some of Respondent's rotary drill bits. (Tr. 427-428).

Additionally, on interrogation in the present cases as to the correctness of the testimony of Colonel Kuldell, president and general manager of Respondent before, at and after the time that the leasing practice was commenced, that the sole reason for initiating the practice of leasing bits instead of selling them was to enable Respondent to study its bits after use and to improve them, Mobley stated "Well, most of the information that I had concerning those times came from the Colonel and he is the man that knew." (Tr. 434.)

In contrast to Mobley's admittedly hearsay testimony, responsible executives and employees of Respondent at the time the leading practice was inaugurated testified that the purpose of the leasing system was to enable Respondent to repossess worn-out bits for engineering inspection and examination, for laboratory tests and analyses, for comparison of their performance with other bits, including experimental bits, for the discovery and correction of defects in bits, and to improve the quality, efficiency and drilling life of bits of its manufacture (Kuldell, DX 9, p. 904, Tr. 235; Scott, DX 20, pp, 14-15, Tr. 235-6; Moore, Tr. 143; Meyer, DX 13, pp. 12-14, Tr. 148-154, 235-6). The unimpeached testimony of Gus Meyer, whose deposition was taken and introduced by Petitioners, establishes that Meyer, a long-time employee of Respondent, conceived the idea of a lease agreement when there was no retipping, and that the sole purpose of the lease was to get bits back so that they could be improved (DX 13, pp. 12-14, Tr. 148-154, 235-6). Retipping did not begin until 1937 (Tr. 613), and the formal lease was adopted in 1934 (DX 10, p. 5, Tr. 235-6).

On examination of the record it is not surprising that the Court of Appeals should have rejected those findings of the District Court in the *Ford* case based entirely on

Mobley's hearsay and incompetent testimony, particularly when such testimony was refuted by many credible witnesses with personal knowledge of the facts.

Another finding of the District Court in the *Ford* case set aside by the Court of Appeals as clearly erroneous related to the factual statement in substance that from the beginning the plaintiff had aggressively obtained all possible patents related to this industry. The evidence was to the contrary, and showed without dispute that competitors of Respondent had been granted a vastly larger number of patents on rock bits than were granted to Respondent. Particularly in the relevant period since 1935 Respondent had issued to it only 38 U. S. Patents (PX 22, Tr. 699, 700), and each of the patentees was an employee of Respondent at the time the application was filed. In the same period the evidence shows that there were granted 282 patents on rock bits to competitors or others (PX 23, Tr. 709.)

The failure of the Petitioners to make any attack on the findings of the District Court in the *Cole* and *Conaghan* cases, which findings were adopted by the Court of Appeals, is sufficiently accounted for by the following comments that said findings are supported by substantial evidence, which justified their adoption by the Court of Appeals.

FINDING 8.

This finding as to Petitioners' wilful violation of Respondent's rights with full knowledge of them, is supported, not only as to Cole (Tr. 166, 169, 171, 582) but also as to Conaghan (Tr. 156-157, 162) and as to Ford (Tr. 174-5, 178, 186, 193).

FINDING 9.

Conaghan testified that he did not consider it his business to worry about whether bits he bought had been stolen (Tr. 157). Ford testified to the same effect (Tr. 183-4). Cole testified that he was aware of the prevalence of bit stealing in the oil field (Tr. 166). On one occasion when some bits were stolen from Ford, Ford realized that Cole might be a likely purchaser because Ford called Cole to ask about them (Tr. 585). Cole checked the numbers and found that he had purchased the stolen bits (Tr. 582-585).

FINDING 16.

Formations drilled vary greatly in hardness, abrasiveness, inclination of plane and in other factors (Tr. 34-5, DX 7, pp. 214-216, Tr. 235). Accordingly, a wide variety of bits are made available. In the softer formations near the surface, there are available and used, drag bits, disc bits, cross roller bits made by Reed, Smith, Globe and other companies and cone bits made by Hughes and other companies (Tr. 253, 462, PX 16, Vol. II, Tab 7, Tr. 573). When cone bits are used, generally speaking their life is done "when they are once put into the hole and withdrawn" (PX 6, p. 117, Tr. 235). In some of these softer formations, the teeth of a limited number of bits may wear more rapidly than the bearings and in some instances these bits can be "retipped", *i.e.*, provided with new teeth. These retipped bits occupy a special position. Metallurgically they are not as sound as new bits (DX 20, p. 15, Tr. 235). Their bearings are worn (Tr. 492), they do not give the service that a new bit does (Tr. 557), and they can be used only in certain formations and under certain conditions (Tr. 249, 459-460, 492, 555, 557).

As soon as drilling progresses much beyond 3,000 feet, the cost of changing the bit will exceed the cost of the bit (Tr. 30-34, DX 30, Vol. III, Tab 9, Tr. 237). Thereafter a retipped bit will not be run.

As drilling depths increase and the formations become generally harder and harder, the type of bits employed vary. In the medium strength formations, cone bits of Hughes and other companies and cross roller bits made by other companies are used (Tr. 253-4). In the very hard formations, there are additionally available and used, diamond bits and diamond core bits (Tr. 460-1, 562-4, 666). The backbone of Hughes' business is in bits for the very hardest drilling (DX 13, p. 36, Tr. 235). In these very hard formations, a single bit may drill but a very few feet. Thus many more bits are required per hundred feet of well than in the soft formations where a single bit may drill hundreds of feet.

FINDING 17.

The only figures in the record as to comparative volume of bits come from reports of Hughes field men. These figures include all Hughes bits, whether used in drilling for oil production, for seismograph or shot-hole work, for water wells or for other purposes (Tr. 656). The reports do not show any competitors' bits used except roller bits used in drilling for oil production at those rigs visited by Hughes field men (Tr. 656). The reports do not show the extent of use of any of the fish tail and drag bits which are available from at least 21 different sources, or the diamond and diamond core bits available from at least 6 and 9 different sources (Tr. 656, PX 16, Vol. II, Tab 7, Tr. 573). Just what the percentage of business enjoyed by Hughes may be is not shown in the record and could not be shown without information from each of the dozens of sources of competitive bits.

The Petition (page 14) states that drag bits and fish tail bits have not been used for many years, and further (page 15) states that the Court of Appeals ignored this evidence and expanded the "relevant field of commerce." The facts are that while few drag bits are run in some parts of the country (Tr. 657), in other parts of the country drag bits are still used (Tr. 659), and are used in sufficient quantities so that at least 21 different concerns offer them to the industry (PX 16, Vol. II, Tab 7, Tr. 573). Judge Wallace made the same error that Petitioners do in considering that drag bits are no longer used, in spite of the conclusive evidence to the contrary. The Petition errs, page 15, in stating that the Court of Appeals ignored any evidence or expanded the field of commerce. The Court of Appeals pointed out that the findings of Judge Wallace as to per cent of business were based upon "incomplete and possibly inaccurate estimates" but for the purposes of the opinion, assumed, without deciding, that the percentage found was approximately correct (Petition, Appendix B, p. 106).

FINDINGS 18, 20, 40 AND 47.

The first portion of Finding 18 is established by evidence referred to in connection with Finding 17. The remainder of Finding 18 and Finding 20 is supported by undisputed evidence from witnesses called by Petitioners. This evidence shows that Hughes' volume of business results directly from the performance of the bits. The Petitioners called 5 witnesses who used bits. The testimony of the first, Miller, is illustrative. He testified that between 80 and 85% of the bits he used were Hughes, and that although other bits were available to him, he used the Hughes bit "because it was the best bit that was built in the world, in my opinion" (Tr. 246-247).

Stephens explained his similar preference for Hughes bits "because they are the most economical bit, and because we could get more hole out of them, make more hole by using that particular bit" (Tr. 463).

Garr testified that he used 90% Hughes bits because "They just make the best bits, in our judgment; give the best service * * * I mean the bits give the best service." (Tr. 486.)

Trigg testified that he used "far and away more" new Hughes bits than any other kind; that he was not forced to do so, but he did so because "we think they are the best bits, in most instances" (Tr. 561, 572).

The fifth witness, Morgan, testified that he used about 80% Hughes bits and that he found the Hughes bit "a very excellent bit" and "the best bit in the world" (Tr. 674).

The nature of Hughes' contribution to the industry was shown in litigation between Hughes and Chicago Pneumatic, the record of which was received in evidence in this case. It was there proved that each of the major improvements incorporated by Hughes' competitor, Chicago Pneumatic, in its bits over a period of 20 years was an improvement invented by a Hughes Tool employee, first used commercially by Hughes and then copied by Chicago Pneumatic (DX 7, pp. 364-367, 394, Tr. 235).

FINDING 19.

This is shown by the testimony of Ayers (DX 23, pp. 25-27, Tr. 235-6)

FINDING 21.

This is established by the agreements themselves (See for example DX 52, Vol. III, Tab 31).

FINDING 22.

This finding is supported by uncontroverted testimony of a number of witnesses including Meyer (Tr. 148-154, DX 13, pp. 10-14, Tr. 235-6); Kuldell (DX 9, pp. 15-19, Tr. 235-6, DX 7, p. 904, Tr. 235); Payne (Tr. 36-9, DX 6, pp. 70-2, Tr. 235); Prell (DX 6, p. 133, Tr. 235); Scott (DX 20, pp. 13-15, Tr. 235-6); and Smith (DX 7, pp. 912, 924, Tr. 235).

FINDINGS 23 AND 24.

These findings as to the variety of drilling conditions encountered, the various specially developed bits for each condition, and Hughes' method of distribution and examination of dull bits, are in no way controverted. They are established by clear evidence, including testimony of a number of witnesses and documentary corroboration, (See for example, DX 6, pp. 71-2, 116, 133, Tr. 235; and DX 7, pp. 391, 904, 912, 924, Tr. 235).

FINDING 25.

This finding as to the many problems involved in design of rotary drill bits is fully established (Tr. 33-36, DX 7, pp. 226-7, Tr. 235) and is confirmed by the testimony of the manager of the Oil Tool Division of Chicago Pneumatic Tool Company, which evidence was here offered by Petitioners (DX 7, pp. 368-370, Tr. 235).

FINDING 26.

By leasing its bits and retaining the right to reclaim each one after its normal life, Hughes is enabled to examine each of the bits after use. The value of such examination of dull bits was explained by Hughes' witnesses, Scott (DX 20, p. 14, Tr. 235-6), and Payne (Tr. 695-696), a former Hughes engineer, Moore (Tr. 143), and also by witnesses called by Petitioners, such as Stephens, drilling

superintendent for Phillips Petroleum Company (DX 6, p. 116, Tr. 235; Miller, Division Manager of the Oil Tool Division of Chicago Pneumatic (DX 7, p. 391, Tr. 235); Noble, vice president and chief engineer of Reed Roller Bit Company (DX 26, p. 8, Tr. 235-6); Hamaker, vice president of Reed Roller Bit Company (DX 25, p. 21, Tr. 235-6). Moreover, exhibits and testimony demonstrating the use of worn bits in research and development work appear in the record. One group were offered to carry back a date of invention in a prior case but inherently demonstrated the value and necessity of examining worn bits in development work (DX 7, pp. 923, 1359-81, Tr. 235). In the present case, in showing the development of a patent here in suit, testimony and exhibits were offered which likewise demonstrate the necessity for having all worn bits available for examination and analysis (Tr. 143, PX 9, Vol. II, Tab 3, Tr. 130).

FINDING 27.

Hughes manufactures from 450 to 500 different bits varying in size and type (Tr. 39). In endeavoring to constantly improve each of these, many problems are involved. Even after a bit has been developed for specific drilling conditions in one size, securing maximum performance in another size is not the simple matter of merely enlarging the relative size of all of the parts (See PX 9, Vol. II, Tab 3, pp. 25-32, Tr. 130). After a specific size and type of bit has been basically proved, large numbers are made up and leased in the regular way (Tr. 681-686). These are run without the driller knowing that they are experimental so that they will be run under normal operating conditions (Tr. 684-686). Hughes' engineers desire such bits to have ordinary runs and not the extra hard ones, or the gentle ones that the various drillers might give the bits if they had knowledge of the

experimental nature of the bits (Tr. 685-6). In the year preceding the trial, Hughes manufactured and leased approximately 18,000 such bits, and in addition, due to demands for nickel in the defense program, was required to use substitute steels in many of its production bits (Tr. 691-693). In addition to the many special bits, Hughes field men must continuously examine standard production bits in each of the 450 or 550 designs because they furnish the yardsticks by which relative merits of experimental bits may be measured (Tr. 695).

FINDINGS 28 AND 29.

Leasing of bits began prior to the adoption of the practice by Hughes in 1932 (DX 6, p. 215, Tr. 235). Chicago Pneumatic Tool Company leased its bits in order to salvage parts and in order to have the dull bits available for research (DX 7, pp. 93, 390-1, Tr. 235). The Reed Roller Bit Company leases its bits for the same reasons (DX 25, pp. 23, 31, Tr. 235-6). Williams Iron Works leased in order to salvage the bit heads (DX 6, p. 106, Tr. 235). Although the purpose of Hughes' leasing is to aid in research and development, Hughes also salvages parts from used bits (Tr. 696-8) and in one year additionally realized a profit of $140,000 from scrap from reclaimed bits.

FINDING 30.

See comments Findings 22 to 29, inclusive.

FINDINGS 31 AND 32.

The Petitioners have repeatedly charged that by enforcement of its patent and other property rights, Hughes attempts to eliminate others from competition. Hughes has not attempted to eliminate anyone from competition but has been concerned solely with invasion of its rights.

The findings properly analyze such efforts of Hughes. In the present case, the Petition (page 6) refers to permitting Hughes "to eliminate retipped bits from the competitive field". Hughes is not attempting to eliminate retipped bits nor does it lie within its power to do so. Hughes does, however, seek to prevent others from appropriating Hughes' property. Each of the Petitioners does in fact retip bits of other manufacturers but by this action Hughes is seeking to protect only its property. Hughes at no time has exercised any coercion and the record shows that it leases freely through supply companies that deal in competitive bits (DX 27, pp. 4, 35, 42, 54, Tr. 235-6) to contractors and oil companies who use competitive bits (Tr. 451, 480, 552) and to contractors who have in the past violated the lease agreement (Tr. 483, 557, 675).

FINDINGS 33 AND 34.

In the District Court the Petitioners sought an inference that since during a period of rising prices Hughes raised its prices on several occasions and soon thereafter some competitors changed their prices to correspond, there was some illegal price-fixing by Hughes. The foregoing finding completely answers this charge and is based upon a sound analysis of the evidence. It is not uncommon in the oil industry, with articles other than rock bits, to find competitors having the same or similar prices for similar goods, and to find competitors all changing prices within a period of hours to weeks after one competitor has taken the lead (DX 27, pp. 27, 50-1, 56-60, Tr. 235-6).

Hamaker, Reed vice-president in charge of sales, testified that there was no agreement, either verbal or written, between Reed and Hughes as to prices (Hamaker, DX 25, p. 22, Tr. 235-6). He further testified that Reed had fol-

lowed Hughes on price changes for the reason "as soon as we find out they have made a move we can take advantage of, we take advantage of it" (DX 25, p. 14, Tr. 235-6).

Hamaker testified that Reed knows in advance that with rising costs it wants to make a price increase, "but we don't want to take the lead in something like that * * * step out and put out increased prices ahead of the field, too far ahead of the field, which we have done sometimes" (DX 25, p. 17, Tr. 235-6). As soon as competitors have changed their prices, it is public information and Reed learns of it from the supply companies (DX 25, pp. 14-15, Tr. 235-6).

Also, when asked if Hughes was the "dominant rock bit manufacturer", Hamaker explained that Hughes was the "largest" but that "they don't dominate from the standpoint if we want to sell a rock bit for more or for less, they don't dominate that, for sure" (DX 25, p. 14, Tr. 235-6).

The Respondent's President (Hughes, DX 21, p. 15, Tr. 235-6), Executive Vice-President (Dietrich, DX 22, p. 31, Tr. 235-6), Senior Vice-President and Managing Director (Ayers, DX 23, p. 38, Tr. 235-6), former Sales Manager (Prell, Dep. Williams, Case p. 115), and other sales personnel (Davis, DX 10, p. 30, Tr. 235-6; Meyer, DX 13, p. 10, Tr. 235-6, and Hyatt, DX 17, p. 59, Tr. 235-6) denied that there was any agreement with Reed or anyone as to prices. There is no evidence to the contrary.

Miller, manager of the Oil Tool Division of Chicago Pneumatic Tool Company, testified that he was responsible for price changes on Chicago Pneumatic Tool Company rock bits (Tr. 469). He testified that he generally followed the prices of competitors (Tr. 469). He further

testified that he was never informed as to when competitors would increase prices but that Chicago Pneumatic Tool Company usually followed a price change within a week to fifteen or twenty days (Tr. 469-70).

The testimony of the Hughes witnesses, of Hamaker and Miller and the supply company witnesses, is corroborated by the exhibits attached to the depositions offered as Defendants' Trial Exhibit 27 (Tr. 235-6). For example, on November 30, 1950, at 7:00 P. M. the Hughes Tool Company sent a telegram to Lucey Products Company, a supply company, stating that effective 12:01 A. M. on December 1st prices would be increased ten per cent. The following morning, December 1st, Reed sent a telegram that Reed prices on certain products were being increased ten per cent and Reed prices on other products were being increased five per cent. Similarly when a price change was made in 1948, Hughes Tool Company on July 23rd, sent a telegram at 6:03 P. M. stating that effective 12:01 A. M., July 24th, prices of rock bits were being increased twelve per cent. The following day on July 24th Reed Roller Bit Company sent a telegram to supply companies stating that effective 12:01 A. M. July 25th Reed prices on rock bits would be increased twelve per cent. The record shows that three other competitors, Chicago Pneumatic Tool Company, H. C. Smith Tool Company, and Globe Oil Tool Company, raised their prices within a week to several weeks thereafter.

The opinion in the *Ford* case took a view contrary to the finding quoted above in the *Cole* and *Conaghan* cases. The *Ford* opinion (Petition, Appendix B, pp. 27-8) placed great stress on the supposed fact that a considerable amount of time is required to effect a price change. Information as to a proposed change is kept secret and yet Reed, in spite of the secrecy, is able to change its prices

to correspond with Hughes within 24 hours after Hughes' price changes are made public (Petition, Appendix B, pp. 27-28). But there is no evidence that it was "impossible to immediately bring about a price change without painstaking research and decision". Hamaker of Reed testified that a study of costs was made prior to a price change and that this took some time (DX 25, pp. 9 and 10, Tr. 235-6). He further testified that this time was consumed on "what we are thinking about, yes", and that "we know in advance of publishing an increased price oftentimes that we want to increase our prices but we don't want to take the lead in something like that" (DX 25, p. 17, Tr. 235-6). He further testified that when Reed Roller learned of a price change by Hughes after it had been made public "We began to take action" (DX 25, p. 15, Tr. 235-6), and the exhibits show that this was done by telegrams (DX 27 and exhibits, Tr. 235-6).

FINDING 35.

In the District Court, the Petitioners charged that since competitors of Hughes lease their bits rather than sell them, an inference should be drawn from it that Hughes somehow coerces them and dictates their marketing policies. The above finding relates to that unfounded and now abandoned charge. Among other evidence supporting this finding is the showing that others leased bits before Hughes did (DX 6, p. 210) and Reed Roller Bit Company began making deliveries at the drilling rigs before Hughes did (DX 25, pp. 3, 30, Tr. 235-6).

FINDING 37.

This finding, that with increasing demands Hughes has expanded, but has not thus discouraged competition, is fully supported (DX 23, pp. 25-27; Tr. 235-6; DX 25, p. 41, Tr. 235-6; DX 7, p. 1177, Tr. 235; PX 25 and PX 26, Tr. 472).

FINDING 38.

During the 1920's and early 1930's, Hughes received patent royalty reports from the . ed Roller Bit Company which showed sales by sizes but showed nothing with respect to customers or areas (Tr. 654-655). The Hughes field men checked in their respective areas and reported the sales and types of Reed bits sold in each area (Tr. 654-655). This was done in order to check the royalty reports against actual sales in the field (Tr. 655). The Petitioners selected a few of the reports relating to this which contained in addition to the verification of sales, comments as to the competitive situation (DX 44, Tr. 238). These comments show that Hughes' personnel were concerned as to the quality of the Hughes bits and were concerned when Reed bits would outperform and out-sell Hughes bits. However, the record showed only a legitimate checking on royalty reports of a licensee.

FINDING 39.

The Petitioners sought to have the District Court draw the inference that since Hughes men delivered bits to drilling rigs, and kept records of bit usage on rigs which they visited, Hughes was in some way engaged in surveillance of its competitors and seeking to secure some unfair advantage over them. The delivery of bits to the well site is an established practice of Hughes and all of its competitors (Tr. 488). Maintenance of records of bit usage is important not only to Hughes personnel in its development work, but such information is likewise of value to the industry. For example, Petitioners' witness Garr testified that he secured such information from Hughes; (Tr. 484-487) that other manufacturers had similar information available; (Tr. 499-500) but that the Hughes information was most complete and therefore most helpful (Tr. 486-7).

FINDING 41.

This finding, relating to Hughes patents, based upon its own development work, is supported by Plaintiff's Exhibits 22 (Tr. 699-700) and 23 (Tr. 709) and the testimony of Payne (Tr. 442, 700).

FINDINGS 42 AND 43.

See comments to Findings 31 and 41.

FINDING 44.

See comments to Findings 16 and 17. (See also PX 16, Vol. II, Tab 7, Tr. 573.).

FINDING 45.

The facts mentioned in this finding have been referred to in comments to previous findings. See also DX 64 (Tr. 238) relating to the effect of volume of business on profits in a business such as the manufacture of rock bits.

FINDING 46.

There is no dispute as to the many thousands of documents from Respondent's files which were made available to Petitioners. Hundreds of thousands were exhibited and Petitioners microfilmed 11,000 to 12,000 of these (Tr. 234, 534). In addition, Petitioners had available one or more documents which Hughes' former lawyer, Mobley, extracted from Hughes' files and turned over to Petitioners (Tr. 414). Support for the remainder of the finding will be found in comments to Finding 18.

FINDING 48.

Petitioners claim no right either by license or ownership, and each admitted that he had trafficked in Respondent's property, knowing that it was Respondent's property, knowing that the bits were marked as Respondent's property, knowing of the lease agreement, and knowing that the lease agreement had previously been adjudicated to retain title and right of possession in Hughes. (Tr. 156-7, 162, 166, 169, 171, 174-5, 178, 186, 193, 582).

It is difficult to understand how the District Court in the *Ford* case could have made converse findings on the same points. The opinion of the Court of Appeals reflects a careful evaluation of the evidence as above set out which readily accounts for its conclusion that the findings of the District Court in the *Cole* and *Conaghan* cases were clearly supported by the evidence and that conflicting findings of the District Court in the *Ford* case were clearly erroneous.

ARGUMENT.

The instant cases were necessarily decided on the particular facts disclosed by the record. That such was proper is settled by *Maple Flooring Association* v. *U. S.*, 268 U. S. 563, 579, wherein this Court rejected cases cited by the Government as controlling and stated:

> "It should be said at the outset that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

The Petitioners here do not recognize such rule. Instead, they seek to have the instant cases decided, not on the particular facts disclosed by the record, but on Petitioners' fanciful version of the facts and their notion that the facts here are analogous to those in the *United Shoe Machinery Corporation* case (110 F. Supp. 295, affirmed 347 U. S. 521), the *Aluminum Company of America* case (2nd Cir. 148 F. 2d 416), and, possibly, the *American Tobacco Company* case (328 U. S. 781). It is respectfully submitted that the controlling facts of those cases are in no way apposite to those of the three present cases.

The lease involved in the *United Shoe Machinery Corporation* case is in no way analogous to Respondent's

lease. That case dealt with machinery having a useful life of ten years or more, and the lease contained restrictive provisions designed to and in fact restricting and penalizing use of competitors' machines by lessees of United Shoe Machinery Corporation. United's lease was for a minimum term of ten years. Its lease contained a provision that required a lessee to use the leased machinery "to its full capacity" on all footwear on which the machinery was capable of being used. In addition, its lessees were required to obtain from the lessor exclusively all duplicate parts, extras, mechanisms, and devices of every kind needed or used in operating, repairing or renewing the leased machinery. Also, United's lease had a provision for return charges and an arrangement whereby a lessee desiring to replace a leased machine could receive more favorable terms on termination of the lease if the replacement was of another United machine rather than a machine of a competitor. The District Court found that by reason of such provisions in the lease, United was able to achieve and maintain control of the shoe machinery market because its lessees were "reluctant to experiment with a competitive machine" and because lessees who installed competitive machines suffered under the discriminatory payment plan. The lease was found to contain other restrictive provisions not contained in the lease of Respondent.

The Hughes lease is simple in form and effect; it contains no provision, direct or indirect, by which a lessee receives favored treatment if he procures his next bit or any other bit from Respondent rather than from a competitor, and contains no provision which makes it disadvantageous for the Respondent's lessee to use bits of competitors. The lease in nowise interferes with or

penalizes the right of a Hughes lessee to use bits of competitors and they do in fact use such bits. (A typical illustration is the well logs included in PX9 (Vol. II, Tab 3, Tr. 130) which show that Hughes bits (OSC, OSW, OSQ) are run with intervening runs of competitive drag bits, Reed bits (SET, SEM, etc.), Chicago Pneumatic bits (HF, SF, etc.), Smith bits and bits of other manufacturers; see PX 9, pp. 55-71; also see well logs PX 7, pp. 1131, 1133, 1135, 1405, 1407, 1409, Tr. 235).

Respondent's lease contains no "tie-in" clause, express or implied. In *Times-Picayune Pub. Co.* v. *U. S.* (345 U. S. 594), this Court reviewed many cases dealing with "tie-in" arangements. At page 614 this Court said:

> "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market."

This Respondent's lease contains no provisions for the forced purchase of any commodity and no contention was made that it does.

Based upon the uncontradicted evidence (supplied in the most part by Petitioners' witnesses), the Court of Appeals stated:

> "The reason the lessees use more Hughes bits is that Hughes offers to the industry a better bit than any other manufacturer." (215 F. 2d, at page 933).

In the earlier case of *Williams* v. *Hughes Tool Company*, 186 F. 2d 278, 285 (10th Cir.) certiorari denied 341 U. S. 903, rehearing denied 341 U. S. 934, second petition for rehearing denied 341 U. S. 956, the Court said:

"The reasons which motivated Hughes in leasing, rather than selling its bits, and in requiring the return thereof for inspection, testing and research are obviously to enable Hughes to improve the quality of its bits, to provide the proper bit for drilling in particular formations or in a particular area, to provide valuable information to drillers who use the Hughes bits, to maintain the high standard of its products and protect their reputation. Failures of retipped bits would tend to injure the reputation of Hughes' bits. The lease agreement and the practice of recovering used bits, as stated by the Fifth Circuit in *Robertson Rock Bit Co.* v. *Hughes Tool Co., supra,* is practical, reasonable and fair."

The only point of similarity between the *Aluminum Company* case and the three instant cases is that Hughes at all material times has owned patents which have been embodied in rock bits of its manufacture, and by reason thereof has been entitled to exercise its lawful patent monopoly of making, selling or leasing such patented bits. (Cf. *U. S.* v. *Line Material Co.*, 333 U. S. 287, at page 305). The Aluminum Company had the same patent protection up to 1909 and by reason thereof lawfully produced practically 100 per cent of all aluminum ingot manufactured in this country. In the district court it was conceded by the Government that during such "patent period" there has been no unlawful monopolization by Alcoa because of its patent protection, and that the monopoly it enjoyed in both bauxite and aluminum was entirely lawful (44 F. Supp. 97, 115.) The Court of Appeals of the Second Circuit also recognized that when the patents there involved were assigned to Alcoa it thus secured a legal monopoly which prevented anyone from competing with it until the expiration of the patent period (148 F. 2d at page 422). In all other respects

the facts of the *Aluminum Company* case differ from the facts of the present cases because Alcoa was shown to have indulged in unlawful practices that resulted in the exclusion of competitors. In the present cases the concurrent findings of the District Court in the *Cole* and *Conaghan* cases and of the Court of Appeals are that Respondent has not indulged in any unlawful exclusionary practice.

The Tenth Circuit Court recognized and followed the applicable principles announced in the *Aluminum Company* case. It accepted the pronouncement in such case that a defendant in an anti-trust case does not violate the statute when it owes its superior or even monopoly position in the market solely to superior skill, a superior product, and economic or technical efficiency. Judge Learned Hand, speaking for the Court in the *Aluminum Company* case, held that the Sherman Act "does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat.*" Such pronouncement was in accordance with and in recognition of the statutory history of the Sherman Act where the discussions in Congress clearly reveal that such Act was not intended to be directed against one "who happens by his skill and energy to command an innocent and legitimate monopoly of a business" (21 Cong. Rec. 3151, 1890). The undisputed testimony in the present cases is that Respondent's volume of business was attributable solely to the fact that its bits were the best and most economical bits in the world. Even the first witness called by Petitioners testified to the use of between eighty and eighty-five per cent Hughes bits and that he could use bits of other manufacturers but used Hughes bits "because it was the best

bit that was built in the world in my opinion" (Tr. 247). There was no testimony in the record that a bit of any competitor measured up to a bit of Respondent in quality, performance and economical use, and the Court of Appeals correctly found that this was attributable to improvements resulting from Respondent's repossession of its worn-out bits for engineering inspection, examination, study, comparison of performance, and for laboratory tests and analyses for the purpose of improving the quality, efficiency and drilling life of its bits and correcting any defects appearing after use.

The opinion of District Judge Wyzanski, in the *United Shoe Machinery Company* case, is also entirely in accord with the statement of Judge Learned Hand and the holding of Chief Judge Phillips of the Tenth Circuit in his opinion in the present cases.

In charging the jury in *Cape Cod Food Products* v. *National Cranberry Association*, 119 F. Supp. 900, 907 (D. C. Mass. 1954), District Judge Wyzanski also recognized this same principle in the following language:

> "There is nothing unlawful under the Sherman Act or any other anti-trust act in trying to get even 100 per cent of the market through skill, efficiency, superiority of product, or like entirely laudable steps."

Petitioners vainly attempt to parallel the three present cases with the status of the Aluminum Company after the expiration of its "patent period" with the statement: "No patent questions are presented here" (Petition, page 3). A complete answer to such unfounded assertion is that the infringed patents of Respondent involved in the present cases did not expire until *after* the actions were commenced, and that Respondent at

all material times has enjoyed the protection of valid and existing patents embodied in rock bits of its manufacture.

Citation of the *American Tobacco Company* case by Petitioners is beyond understanding. That case involved a combination and conspiracy by the "Big Three", American Tobacco Co., Liggett & Myers Tobacco Co., and R. J. Reynolds Tobacco Co., to monopolize the cigarette industry. This Court there said that since combination or conspiracy was termed by the trial judge as an "essential element" and an "indispensable ingredient" of the offenses charged, the case constituted a precedent only where such factors were present. (328 U. S. at page 798.) The record in the instant cases is devoid of any evidence of combination or conspiracy.

The only evidence from which the District Court in the *Ford* case erroneously inferred that Respondent and Reed Roller Bit Company conspire to fix the prices of rock bits is that when Respondent changes the price of its bits, its competitors change their prices to correspond with the prices set by Hughes. (It is significant that said District Court did not find that *all* rock bit manufacturers who charge corresponding prices are members of such imagined conspiracy.) That Reed and other manufacturers of drilling bits could price their corresponding bits at the same prices set by Hughes and sell them in increasing numbers indicates competition and not a lack of it. The mere fact that competitors may see proper, in the exercise of their own judgment (as shown by this record), to follow the prices of another manufacturer, does not establish domination of an industry, show suppression of competition, or prove a combination or conspiracy. (*U. S.* v. *International Harvester Co.*, 274 U. S. 693, 708, 709; *U. S.* v. *U. S. Steel Corp.*, 251 U. S. 417,

448, 449.) In *Theater Enterprises* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541, Mr. Justice Clark recently said:

> "But this court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

In spite of a failure by Petitioners to furnish an adequate comparison of the profits earned by Respondent for producing "the best bit in the world" and profits earned by its competitors, the District Court in the *Ford* case termed Respondent's profits "exhorbitant" and questioned whether anyone could urge "that such excessive profit is the plaintiff's logical reward for having given a fine product to the oil and gas industry" (114 F. Supp. at page 544)

Even though the profits earned by Respondent may have aroused the indignation expressed by the District Judge in the *Ford* case, this Court has announced that "indignation based on notions of morality of this or any other court cannot be judicially transmuted into a principle of law", and in the absence of legislation by the Congress furnishing an appropriate guide the sentiments expressed by such court carry absolutely no weight. (*U. S.* v. *Bethlehem Steel Corp.*, 315 U.S. 289, at pages 308, 309.) Petitioners' own exhibit in the trial courts (Exhibit 64, a Standard and Poor's publication) conclusively shows that Hughes' profits are in no sense disproportionate to the profits of its competitors. A com-

parison of the only rock bit manufacturers listed in that publication shows that the average annual profits for a six-year period were: Chicago Pneumatic Tool Company, 32.7%; Ingersoll-Rand Company, 30.7%; Hughes Tool Company 25.2%. Such profits, considered "in their commercial environment, cannot be considered exceptional." (*Cf. U. S.* v. *Bethlehem Steel Corporation, supra.*)

In view of the fact that Respondent's rock bits were manufactured under valid patents, a pertinent statement is found in *U. S.* v. *United Shoe Machinery Co.*, 247 U.S. 32, 65:

> "Let us guard against confusion and not confound things which must be kept in distinction. A patentee is given rights to his device, but he is given no power to force it on the world. If the world buy it or use it, the world will do so upon a voluntary judgment of its utility, demonstrated, it may be, at great cost to the patentee. *If its price be too high, whether in dollars or conditions, the world will refuse it; if it be worth the price, whether in dollars or conditions, the world will seek it.* To say that the world is not recompensed for the price it pays is to attack the policy of the law,—is to defy experience and to declare that the objects of the inventive genius all around us have contributed nothing to the advancement of mankind." (Emphasis supplied.)

Petitioners, as brazen converters and traffickers in dull bits of Hughes ownership, are in no position to assert that the lease price of a new bit is too high resulting in correspondingly higher profits. The position of Respondent, as the leading manufacturer of rock bits, furnishes convincing proof that the drilling industry disagrees with the holding of the District Court in the *Ford* case that the price charged for a lease of a new bit is too high. If such were true the drilling industry would refuse Respondent's bits and not seek them (*Cf. United States* v. *United Shoe Machinery Co., supra*).

The record now before this Court, as distinguished from Petitioners' fanciful version of it, discloses a firm evidentiary basis for the concurrent findings of fact of the District Court for the Western District of Oklahoma and the Court of Appeals for the Tenth Circuit.

CONCLUSION.

For the foregoing reasons, it is submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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EDWARD A. HAIGHT,
Counsel for Respondent.

Dated: January 6, 1955.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Oklahoma

HUGHES TOOL COMPANY, a corporation,
Plaintiff,
vs.
D. B. COLE,
Defendant.
No. 4370—Civil

FINDINGS OF FACT and CONCLUSIONS OF LAW.

Findings of Fact.

1. The plaintiff, Hughes Tool Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business and office in the City of Houston, County of Harris, and State of Texas, where it manufactures rotary drill bits.

2. Defendant, D. B. Cole, is a resident and inhabitant of the city of Shawnee, County of Pottowatomie, State of Oklahoma, and of the Western District of Oklahoma and has there operated a shop in which, in addition to other work, he has retipped rotary drill bits of plaintiff's manufacture and ownership without plaintiff's consent.

3. The plaintiff is, and at the time of the filing of the complaint herein was, the owner of Fletcher Patent No. 1,856,627, Scott and Garfield Patent No. 1,983,316 and the Scott, Garfield and Cockrum Patent No. 2,333,746,

together with all rights of action for past infringement thereof.

4. Plaintiff and its predecessor, the Hughes Tool Company, a Texas corporation, have placed the required statutory notice on all rotary drill bits manufactured, sold or leased by them, or either of them, under said Letters Patent.

5. For many years last past the plaintiff has been engaged in the business of manufacture of rotary drill bits and other products, and has marked each of the rotary drill bits manufactured as property of the plaintiff and has distributed them under a lease agreement appearing on a delivery ticket signed by the lessee recording each transaction by which said bits are distributed, reading as follows:

> "Hughes roller rock bits and all core bit heads are never sold but are leased. When the original cutter teeth and/or bearing have served their useful life, the user will surrender the bits to Hughes Tool Company upon request. In accepting delivery, the user agrees not to surrender any of the tools as mentioned above to other than a duly authorized representative of the Hughes Tool Company."

6. The defendant, within six (6) years prior to the filing of the complaint herein, and within this District and with knowledge of the provisions of the aforesaid lease agreement, and with knowledge that plaintiff retains title to rotary drill bits of its manufacture and that each such bit bears the legend that it is the property of the plaintiff, and with knowledge of the holding of the District Court for the Western District of Oklahoma, affirmed by the Court of Appeals for this Circuit, that such lease agreement was valid and that the retipping of plaintiff's bits without plaintiff's consent infringed plaintiff's pat-

ent to Fletcher No. 1,856,627 and plaintiff's patent to Scott and Garfield No. 1,983,316, and constituted an unlawful interference with plaintiff's property and contract rights, has obtained possession of worn drill bits of plaintiff's manufacture, cleaned them, heated the stubs of the worn teeth, applied new metal, and built teeth substantially identical in form and arrangement to the teeth originally provided by plaintiff. The defendant has systematically paid and encouraged lessees of plaintiff's bits, their employees and others, to breach valid, effective and reasonable provisions of the lease agreement in obtaining possession of used bits owned by plaintiff for the purpose of rebuilding the worn teeth thereof in substantially identical form and arrangement to the teeth originally provided by plaintiff.

7. The defendant has rebuilt the teeth on worn bits of the OSC series of plaintiff's manufacture, and has deleted portions of the stubs of heel teeth on other series of worn bits of plaintiff's manufacture and rebuilt teeth thereon so as to produce on such rebuilt bits a cutter conformation like that on the OSC series bits of plaintiff's manufacture. Rebuilt bits do not give as good service as new bits. All parts of the bits wear when used and there may be undetected cracks or excessive wear in the bearings which are undetected in the rebuilt bits. The rebuilt bits lack the uniformity and hardness of metal found in new bits. Failures of retipped bits would tend to injure the reputation of plaintiff's new bits.

8. The defendant, with knowledge of the provisions of plaintiff's lease agreement and with knowledge that rotary drill bits of plaintiff's manufacture are marked as property of plaintiff, and that plaintiff retains title thereto, have trafficked in worn bits of plaintiff's manufacture and ownership, has bought such bits from lessees,

employees or lessees, and others, and has sold worn bits of plaintiff's manufacture and ownership, some of said worn bits having been repaired either by the defendant or by others, all without plaintiff's consent.

9. The defendant, with knowledge that bits of plaintiff's manufacture have been stolen, has bought such bits without knowing or caring whether they were stolen.

10. Validity of claims 1, 2 and 3 of Fletcher Patent No. 1,856,627 and claims 1, 2 and 3 of Scott and Garfield Patent No. 1,983,316, is not denied.

11. The invention described in Scott, Garfield and Cockrum Patent No. 2,333,746 and claimed in claims 1 and 4 thereof made possible bits having many advantages, among which are increased drilling speed, increased bit life, improved capacity for removal of cuttings, improved ability to shed formation and less tendency to "ball up," ability to drill straighter hole, particularly in the softer, unconsolidated formations, and extended the use of rolling cutter bits with increased rate of penetration into formations that previously could not be drilled with that type of bit.

12. Early tests of bits embodying the invention described and claimed in Scott, Garfield and Cockrum Patent No. 2,333,746, showed that such bits in some of the less hard, unconsolidated formations, such as shale, gypsum, anhydrite, chalk and limestone, increased this speed of drilling such formations from 28% to 40% over the bits theretofore known which were best adapted to drill such formations, and increased the footage drilled by from 20% to 24%.

13. As a result of performance in field tests of bits embodying the invention of Scott, Garfield and Cockrum

Patent No. 2,333,746, the demand for such bits was so great and insistent that the plaintiff began commercial production of such bits prior to the filing of the patent application for said patent, and the demand has increased so that such bits now constitute about forty per cent (40%) of plaintiff's production of rotary drill bits.

14. Bits embodying the invention of Scott, Garfield and Cockrum Patent No. 2,333,746 have proved so superior in soft, unconsolidated formations that they have displaced, in many areas, not only prior types of roller cutter bits, but also prior types of drag bits and have enabled the use of roller cutter bits in formations theretofore drilled only with drag bits. The invention of the Scott, Garfield and Cockrum Patent No. 2,333,746 was not one which would have been obvious in 1940 to a person having ordinary skill in the art.

15. The most common method of drilling oil and gas wells consists in rotating a string of pipe with a rotary drill bit on the lower end of the pipe and forcing a fluid down through the pipe to bring the cuttings to the surface of the earth.

16. For many years various types of rotary drill bits have been available and used including drag bits which disintegrate the formation by a scraping action, rolling cutter bits which disintegrate the formation with a chipping and crushing action, and disc bits which disintegrate the formation with a combination action; recently diamond bits having diamonds partially imbedded in the head of the bits, which scrape and disintegrate the formation, have been available and have been used, and diamond core bits, originally intended to permit recovery of samples of the formation being drilled, have been used in certain formations to make hole in the place of bits designed for that purpose alone.

17. The true percentage of rotary drill bits manufactured by the plaintiff is not established in the record as the estimate of percentages of usage are incomplete and the estimated percentages would be reduced to an unknown figure by like proper consideration and inclusion of competitive products of other manufacturers used for the same purposes, which other products are wholly excluded from the computations of percentage usage set forth in the record; the record shows that in the United States and Canada during the 11 years from 1940 to 1950, the total use of bits of plaintiff's manufacture for all purposes (drilling for oil and gas, seismograph drilling, quarry drilling and water well drilling) was about 73% of the use of rolling cutter bits (*i.e.*, not including competitive drag bits, disc bits, diamond bits or diamond core bits) in drilling for gas and oil only.

18. Although the record does not establish the percentage of total bit usage, except to show that it is less than 73%, the rotary drill bits of plaintiff's manufacture for many years have been in great demand, and such rotary drill bits of plaintiff's manufacture are shown by unchallenged proof to be the "best rotary drill bits in the world". The widespread use of plaintiff's patented bits and the overwhelming preference of the industry to use plaintiff's bits has resulted from the superiority of those bits themselves which have embodied inventions made by plaintiff's employees, to which plaintiff has been granted exclusive rights of manufacture, sale and use by United States patents.

19. In the last two years plaintiff has been requested by the Petroleum Administration in Washington, an agency of the Federal Government, to tool up and invest money to produce rock bits at a fantastic increase, and has been asked by such governmental agency to confirm that plain-

tiff will guarantee to hold up its participation in the market. To produce in the year 1952 what the Petroleum Administration asked plaintiff to produce required plaintiff to spend approximately $2,000,000 in overtime and required large additional capital expenditures estimated to be $5,000,000.00.

20. Plaintiff's position as the leading manufacturer of rotary drill bits is attributable to the preference of the industry for bits of its manufacture because of their superior performance and because of the beliefs of drilling contractors and oil companies generally that plaintiff's bits are the most economical to use. The overwhelming preference of the industry for rotary drill bits of plaintiff's manufacture is shown to result from the performance of such bits characterized by witnesses for the defendant as the "best bits in the world".

21. The plaintiff, in instances, in entering into contracts terminating litigation and threatened litigation, has waived claims for damages in consideration of agreements to refrain from future infringement of plaintiff's patent and property rights; such contracts do not constitute unreasonable restraint of trade and commerce.

22. About twenty years ago, the plaintiff began the manufacture of improved rotary drill bits and changed its method of distribution. Prior to that time, plaintiff manufactured a large cumbersome bit head to which were secured removable cutting cones. Two types of cutting cones were manufactured and these cones were sold to supply companies who stocked them in their warehouses and sold them to users. In about the year 1932, plaintiff began the manufacture of improved bits having integral heads and cutting cones. These bits were marked as property of plaintiff and were delivered to drilling rigs by plaintiff's representatives who then picked up the worn

bits for examination, in instances including laboratory examination and analysis, and eventual salvage of material.

23. The formations encountered in drilling vary widely as to strength, friability, unformity, tilt, abrasiveness and plasticity. At the present time, and beginning in the middle 1930's, plaintiff has manufactured various drill bits, each specially designed for particular type formations encountered in drilling.

24. Plaintiff's field organization delivers bits of plaintiff's manufacture directly to the rotary rigs and endeavors to pick up all of the used bits of plaintiff's manufacture. Each used bit is examined by a representative of the plaintiff and many are further examined by field engineers who are part of the plaintiff's organization. Some of these bits are shipped to plaintiff's laboratory in Houston where they are subject to further examination, including physical, matallurgical and chemical analyses.

25. The problems involved in the design of rotary drill bits are many: the limited space of the hole being drilled and in which the bit is necessarily confined must be utilized to provide adequate bearings, adequate cutter shell strength, adequate teeth and a proper balance between each of these factors and between each of the cutters on the bit. It is desired to have a smooth running bit which will minimize fatigue on the drill stem, which will drill both hard and soft formations, which will have adequate clearance in the wall of the hole, which will drill as fast as possible, which will drill as many feet of formation as possible, in which the cutters are adapted to shed formation readily and are adequately ventilated and will not lock or ball up, which will not lose any parts in the hole, which will cut the full bottom of the hole, which will

keep the gauge of the hole, which will operate with varying volumes of flushing fluid, and with flushing fluids of varying consistencies, which will operate with varying weights upon it, and which will withstand heavy shock loads.

26. In designing drill bits which will drill various type formations with fair footage but specifically adapted to a specific formation, the plaintiff is greatly aided by its method of distribution by which it has available to it for examination all worn bits of its manufacture.

27. Plaintiff's desire to recover all worn bits for examination is attacked as unnecessary to plaintiff's research and product development and some witnesses expressed opinions that plaintiff could secure the return of experimental bits for laboratory examination by making special arrangements when such bits are run without requiring the return of all used bits. The testimony of employees of plaintiff familiar with plaintiff's research and development program shows that return of merely experimental bits would be insufficient as plaintiff's field men and engineers must have thorough familiarity with performance and worn condition of standard bits in order to evaluate performance and the worn condition of experimental bits. Such testimony also shows that observation of used bits is helpful and essential to plaintiff's evaluation of and improvement of its standard bits. Such evidence further shows that palintiff in the last year, manufactured and distributed about 18,000 experimental bits. In instances in which there was a major change from the standard product, the user would be advised as to the experimental nature of the bit and usually an engineer in plaintiff's employ would accompany the bit and know all details of its performance, and the conditions under which it was run; but in the majority of instances,

the experimental nature of the bit was not disclosed in order that the experimental bit would be run under normal conditions without either the severe usage or the timid usage that might have resulted had the driller been advised that the bit was a test bit. The evidence shows that plaintiff's method of distribution by lease which retains title in plaintiff and gives plaintiff the right to repossess each used bit is essential to plaintiff's research and development program and is practical, reasonable, and fair.

28. Other manufacturers of rotary drill bits and other products used in the oil industry lease, rather than sell them. Such manufacturers of rotary drill bits have reclaimed parts and materials from used bits and reused them in the production of new bits. The plaintiff also has reclaimed parts from used bits to a limited extent and has reclaimed materials from used bits.

29. After salvage of any parts or materials having special utility, plaintiff salvages the high alloy steel in its bits by sale of them for scrap. In the sale of used bits for scrap, plaintiff realizes a substantial profit (in the year 1947 profits from this source was $140,000.00).

30. The plaintiff's lease agreement and the plaintiff's practice of recovering used bits is practical, reasonable and fair.

31. The plaintiff has properly and lawfully protected its patent and other property rights from infringement and invasion; but neither in such efforts to protect its rights, nor in any other way has the plaintiff excluded, or attempted to exclude, any one from entering into competition by the manufacture or repair of rotary drill bits in the United States.

32. The plaintiff has asserted title to rock bits of its manufacture which it has leased and not sold, and has opposed acts of others in wrongfully acquiring possession of such bits and rebuilding them, but these efforts have been confined to protection of plaintiff's own property, and neither by such acts nor in any other way has plaintiff prevented the development or growth of any independent business in the United States for maintaining and repairing roller rock bits not belonging to plaintiff or complained of or prevented the retipping of roller rock bits of other manufacture.

33. The plaintiff fixes the lease price of its bits and either shortly thereafter or within a few weeks or months of a price change by the plaintiff, competitors have changed their prices to correspond; the acts of competitors in following price changes of plaintiff were independently made and do not establish any suppression of competition, nor any illegal domination by plaintiff or agreements to fix prices.

34. The plaintiff has not conspired with the Reed Roller Bit Company, nor with any one else, to fix the prices of roller rock bits throughout the industry.

35. The fact that competitors have seen fit to lease their bits, rather than to sell them, in no way establishes any wrongful act on the part of the plaintiff, but on the contrary, is evidence that leasing, rather than selling, is a usual practice in the industry and is essential, practical, reasonable and fair.

36. The license implied from sale in the usual channels of trade does not apply to plaintiff's sale of used drill bits for scrap.

37. As the need for rotary drill bits has increased and as the demand for bits of plaintiff's manufacture has

increased, plaintiff has expanded its facilities for manufacture, and has been requested so to do by an agency of the Federal Government, but plaintiff's expansion has not discouraged competition and competitors have likewise expanded and are presently expanding their facilities.

38. Many years ago, the plaintiff received patent royalties on certain bits manufactured by the Reed Roller Bit Company under a patent first owned by plaintiff's predecessor, and plaintiff's practice at the time, to have its field men report on the extent of sales by the Reed Roller Bit Company, was properly employed to check on the royalty reports from Reed Roller Bit Company and did not give plaintiff any unfair competitive advantage.

39. Neither by industrial surveillance, nor in any other way, has the plaintiff controlled the market role of its competitors, or excluded their entry into the market.

40. The plaintiff, through research, product development, laboratory testing, and field trial and observation, has made substantial contributions to the rock bit industry and has sought and obtained patent protection on some of its contributions, and inventions of one or more of said patents have at all times been embodied in plaintiff's bits.

41. Since 1935, plaintiff has had issued to it thirty-six (36) patents on roller drill bits, out of a total of three hundred eighteen (318) of such patents issued. Each patent issued to plaintiff was for an invention made by one or more of its employees. During the same period, four competitors were each issued substantially as many, or more patents as were issued to plaintiff and of these two competitors were issued substantially more.

42. The plaintiff's patent policy has been to protect its own development and products, and it has not pursued an overreaching, aggressive patent policy such as might discourage healthy competition.

43. The plaintiff distributes its bits in containers properly marked showing that each bit is made under one or more United States patents. In June, 1949, there were sixteen (16) patents, one or more of which were embodied in each bit so distributed by plaintiff, and in July, 1952, there were ten (10) patents, one or more of which was embodied in each bit so distributed by plaintiff. Plaintiff has enforced its patent rights by litigation, when necessary. Every patent infringement action filed by plaintiff has been filed in good faith to protect developments of plaintiff.

44. The plaintiff has not throttled or discouraged competition; now competing with plaintiff in the manufacture and distribution of roller bits are at least twelve manufacturers of roller cutter rotary drill bits, at least ten manufacturers of drag bits, and at least two manufacturers of disc bits, and at least six manufacturers of diamond bits and diamond core heads. In addition, cable drilling is competing with rotary drilling and there are numerous manufacturers of bits used in cable drilling.

45. The defendant has urged that the fact that the profits before taxes of the plaintiff are higher than the profits of some other manufacturers of metal products is an indication that the plaintiff is a monopoly. No proper comparison can be made between the profits of the plaintiff and the profits of other manufacturers for the reasons that: the plaintiff not only manufactures its rotary drill bits but delivers them to the ultimate user at the site of use; the plaintiff's developments and contributions to

the industry have resulted in patents of outstanding merit entitled to liberal reward; the plaintiff has produced bits characterized even by defendant's witnesses as "the best bits in the world"; and the demand for plaintiff's bits has been so great that plaintiff's volume is greater than each of, or most of, its competitors, resulting in manufacturing economy, reduction in unit cost, and increase in profits.

46. By discovery proceedings, hundreds of thousands of documents in plaintiff's files were made available to the defendant and the defendant microfilmed 11,000 to 12,000 documents. Of these, approximately 100 were offered in evidence. These documents failed to establish any policy by plaintiff to monopolize or unreasonably restrain commerce, and they, together with all of the evidence in the case, establish that the plaintiff has achieved leadership in the rotary drill bit industry by a policy of developing products which will best serve the industry and reduce its costs, not only for rotary drill bits, but for other equipment and supplies.

47. The extent to which plaintiff's bits are preferred in the industry, and the profits to the industry and to the plaintiff, have resulted from plaintiff's policy of continuous research and development to produce the "best bits in the world".

48. The defendant had no license under plaintiff's patents, and had no title or other right to plaintiff's bits, and the acts of the plaintiff to protect its patent and property rights were proper and have not in any way injured or damaged any property or rights of the defendant.

49. The plaintiff is not guilty of laches.

Conclusions of Law.

1. The Court has jurisdiction of the parties and the subject matter hereof.

2. The plaintiff is, and at the time of the filing of the complaint herein was, the owner of Fletcher Patent No. 1,856,627, Scott and Garfield Patent No. 1,983,316, and the Scott, Garfield and Cockrum Patent No. 2,333,746, together with all rights of action for past infringement thereof.

3. Claims 1, 2 and 3 of the Fletcher Patent No. 1,856,-627, Claims 1, 2 and 3 of the Scott and Garfield Patent No. 1,983,316 and Claims 1 and 4 of the Scott, Garfield and Cockrum Patent No. 2,333,746 are good and valid in law.

4. Each of Claims 1, 2 and 3 of the Fletcher Patent No. 1,856,627, each of Claims 1, 2 and 3 of the Scott and Garfield Patent No. 1,983,316 and each of Claims 1 and 4 of the Scott, Garfield and Cockrum Patent No. 2,333,746 has been infringed by the defendant prior to the filing of the complaint herein and within six years thereof.

5. The plaintiff by its lease agreement retains title to each of its bits used in the United States and neither the original lessee nor anyone else has the right to retip or rebuild the teeth thereon without the consent of the plaintiff; and neither the original lessee nor anyone else has the right to buy, sell or traffic in bits owned by plaintiff.

6. The defendant by retipping plaintiff's bits with full knowledge of the lease agreement has interfered with plaintiff's contract and property rights, and is liable for any damages caused the plaintiff by so doing.

7. The defendant has knowingly converted rotary drill bits of plaintiff's manufacture and ownership knowing that they were the property of plaintiff.

8. The acts of the defendant in retipping bits of plaintiff's manufacture constitute reconstruction of said bits and not mere repair and are an infringement of Claims 1, 2 and 3 of the Fletcher Patent No. 1,856,627, Claims 1, 2 and 3 of the Scott and Garfield Patent No. 1,983,316 and Claims 1 and 4 of Scott, Garfield and Cockrum Patent No. 2,333,746.

9. The plaintiff is entitled to a permanent injunction enjoining defendant from further infringement of Claims 1 and 4 of the Scott, Garfield and Cockrum Patent No. 2,333,746 and from further acts of conversation of plaintiff's rotary drill bits and from further interference with the lease contracts of plaintiff and with plaintiff's property rights in its bits.

10. Plaintiff is entitled to an award of damages which it suffered by reason of the defendant's patent infringement, interference with plaintiff's contract and property rights, and conversion of plaintiff's bits.

11. The defendant's counterclaim should be dismissed at his cost.

ENTER:

Edgar S. Vaught
United States District Judge

NOTE: Identical Findings and Conclusions, save for name and residence of the defendant, were entered in the *Conaghan* case.

FILED
FEB 24 19
HAROLD B. WILE

IN THE

Supreme Court of the United States

October Term, 1954

No. 475

B. W. Ford, D. B. Cole, and B. F. Conaghan, *Petitioners*,

vs.

Hughes Tool Company, *Respondent*.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1954

No. 475

R. W. FORD, D. B. COLE, and B. F. CONAGHAN, *Petitioners*,

vs.

HUGHES TOOL COMPANY, *Respondent*.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI

Petitioners respectfully petition this Court to rehear the Petition for Certiorari in the above case, in view of the following facts and reasons, which were not placed before this Court in the original petition.

(1) The antitrust violations of the Hughes Tool Company have been of such magnitude as to cause the Department of Justice to investigate them, and insofar as can be determined by petitioners, it appears that an action by the Department of Justice is likely to result in the near future.

(2) The Department of Justice has sent its attorneys to review the files and evidence in the hands of petitioners' counsel.

(3) The Wall Street Journal, on February 1, 1955, carried the following statement (not in any way caused or incited by petitioners or their counsel):

> In the case favoring millionaire Howard Hughes' drilling machinery firm, the Supreme Court merely announced that it would not review the lower court's ruling. Although the High Tribunal didn't hand down a ruling of its own, the effect of its refusal to review the case is to go along with Hughes' leasing system, at least for now.
>
> It's always possible, of course, that the Supreme Court would agree to rule on some future antitrust case against Hughes. The Justice Department's antitrust investigators, for instance, have been looking into the oil well drilling machinery business for possible antitrust law violations. Presumably, their investigation has included the practices of Hughes Tool. Whether a case will ever result no one knows.

(4) Failure of this Court to act on this Petition for Certiorari will leave petitioners helpless and remediless, even though the righteousness of their cause may well be established in the near future by a case filed by the Department of Justice.

Failure of this Court to act here will put several hundred skilled retippers out of work, stop a business of approximately $2,000,000 a year, and remove all actual price competition in the roller drill bit business, pending action by the Department of Justice.

There is an adequate background of facts and law in this case for this Court to correct the judgment below and prevent a gross miscarriage of justice against these petitioners, who have shouldered the burden of doing most of the spade work for the Department of Justice.

Petitioners, of course, would prefer that this Court allot to these cases a full consideration at this time. Should this prove impossible, petitioners, in the alternative, request that this Petition for Certiorari be reheard and decision thereon withheld pending a final decision by the De-

partment of Justice as to whether or not it will take action against the Hughes Tool Company for these same alleged antitrust violations. This will at least protect petitioners from a gross injustice until the Department of Justice can decide whether or not to take action.

A copy of this request is being served upon the Attorney General of the United States, so that he may furnish additional facts to this Court bearing on this petition.

Respectfully submitted,

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Counsel for Petitioners.

Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith, and not for delay (other than as specifically pointed out in the petition itself), and is restricted to the grounds permitted by Rule 58(2).

ROBERT F. DAVIS
Attorney for Petitioners